Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LONG ISLAND JEWISH MEDICAL CENTER,

Petitioner,

vs.

GLENISS S. SCHONHOLZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employer's undertaking to provide severance benefits to a limited number of senior executives -- an undertaking that neither required nor resulted in the establishment of an "ongoing administrative program" of any kind -- constituted an ERISA "plan" simply because the exercise of discretion might be implicated in determining whether or not to extend benefits to an individual employee, an issue as to which the circuits have expressed confusion and disagreement with respect to the interpretation of this Court's decision in *Fort Halifax Packing Company v. Coyne*, 482 U.S. 1 (1987).

2. Whether a federal court may create a federal common law remedy based on promissory estoppel to create a claim to benefits under ERISA where, by its terms, ERISA would otherwise not be applicable, an issue as to which the circuits are in conflict.

RULE 29.1 STATEMENT

Petitioner is a New York not-for-profit corporation, which has no parent company. It has one subsidiary, Transitions of Long Island, Inc., a New York Corporation.

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Long Island Jewish Medical Center ("LIJ") respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion and order of the Court of Appeals for the Second Circuit is reported at *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72 (2d Cir. 1996), and reproduced at pages A-1 to A-15 of the accompanying Appendix. The opinion and order of the District Court for the Eastern District of New York, granting LIJ's motion for summary judgment, is reported at 889 F. Supp. 610 (E.D.N.Y. 1994), and is reproduced at pages A-16 to A-23 of the Appendix. The opinion and order of the District Court for the Eastern District of New

York, denying in part and granting in part LIJ's motion to dismiss, is reported at 858 F. Supp. 350 (E.D.N.Y. 1994), and is reproduced at pages A-24 to A-32 of the Appendix.

JURISDICTION

The Court of Appeals entered its judgment on June 26, 1996. A-33 to A-34. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1144(a) provides, in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1102(a)(1) provides:

> (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

29 U.S.C. § 1102(b)(3) provides, in relevant part:

> Every employee benefit plan shall --
>
> * * *
>
> (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.

STATEMENT OF THE CASE

Following declaration of his intention to retire, the President of LIJ, Dr. Robert Match, issued a two-page memorandum awarding generous "golden parachute" severance benefits to his Chief Operating Officer, plaintiff-respondent Gleniss Schonholz, in the event her at-will employment was later terminated for reasons other than cause.[1] A-35-37.[2] Though the two-page Severance Memorandum stated that seven other members of Match's inner management circle fell within its ambit, only Ms. Schonholz, who had reviewed the Memorandum prior to its issuance, claims to have benefitted thereunder. By its terms, the Memorandum granted specified benefits for a specified term.

The Severance Memorandum was not submitted to LIJ's Board of Trustees for review, much less approval. R. 453, 484-86, 502. Indeed, it did not come to the Board's attention until after Dr. Match and Ms. Schonholz exchanged letters requesting and submitting her resignation. R. 1429-31. Significantly, at that point in time, Ms. Schonholz had already requested an executive search firm to find her another position, even including one in another field. A-38.

The LIJ Board, upon finally learning of the Severance Memorandum, and prior to the effective date of Ms.

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[1] The factual statement largely presupposes the facts are as asserted by plaintiff-respondent. For convenience, "LIJ" refers to the petitioner-defendant, Long Island Jewish Medical Center. The term "ERISA" refers to the Employee Retirement Income Security Act, 88 Stat. 832, as amended, 29 U.S.C. § 1001, *et seq*. The "Severance Pay Memorandum," "Severance Memorandum," or "Program" all refer to the alleged severance arrangement at issue herein, purported to have been established in the May 3, 1991 memorandum to the members of the President's Council from Dr. Match. The "May 3 Memorandum" refers to that same May 3, 1991 memorandum.

[2] Citations to the accompanying appendix will take the form "A-__." Citations to the joint appendix that constituted the record before the Court of Appeals will take the form "R. __."

Schonholz' resignation, immediately revoked the Memorandum as unauthorized. R. 352-62, 633-34.[3]

Ms. Schonholz was employed by LIJ from 1980 until April 1, 1993. R. 25-26. From 1987 until April 1, 1993, Ms. Schonholz was a Senior Vice-President and Chief Operating Officer of LIJ. *Id.* Schonholz was also a member of LIJ's "President's Council," a body established by Dr. Match, consisting of Dr. Match and his eight most senior managers. *Id.*, R. 883.

Prior to this litigation, when a senior manager was involuntarily terminated by LIJ, LIJ would decide what benefits, if any, the manager would receive on a discretionary, *ad hoc* basis. The discretionary decision as to whether to grant a senior manager any benefits upon involuntary termination, and in what amount, rested, ultimately, with Dr. Match. R. 1090-92, 743-44.

The Severance Memorandum

In early 1991, Dr. Match was importuned by his inner circle either to develop employment contracts for them or to institute a severance policy because "they were concerned about the possibility that if they were asked to leave, they had no protection whatsoever...." R. 447. On or about May 3, 1991, following review by Ms. Schonholz, Dr. Match circulated a two-page internal memorandum -- prominently labelled as "*Confidential*" -- to the members of the President's Council. A-35-37.

The May 3 Memorandum purported to establish a "severance pay program" for the eight officials, including Ms. Schonholz, to whom the Memorandum was sent. Dr. Match *never* forwarded a copy of the May 3 Memorandum or

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[3] The sole ground for federal court subject matter jurisdiction alleged by plaintiff-respondent is jurisdiction through ERISA, pursuant to 29 U.S.C. § 1132 and 28 U.S.C. § 1331. The jurisdictional issue is central to this Petition, as LIJ contends that the Second Circuit erred in finding an "ERISA plan" and, as a consequence, federal court jurisdiction existed.

disclosed its contents to the LIJ Board of Trustees. R. 453, 484-86, 502.

> The May 3 Memorandum provided, in pertinent part:
>
> Under the terms of this program, any member of the President's Council who is involuntarily terminated or removed from his position, for other than illegal conduct or for substantially deficient performance which is detrimental to LIJ, shall be entitled to receive his regular weekly salary, in effect as of the day before his termination for the specified period of time outlined below ....

A-35. The May 3 Memorandum included a table indicating the amount of severance an employee would receive based on years of service. For example, an employee with more than ten years of experience would receive one year of severance, plus an additional six months if the employee could not find employment commensurate with his or her former position within one year, provided the employee had made a good faith effort to find such employment.

LIJ took no steps toward establishing any administrative mechanism related to the severance policy as articulated in the May 3 Memorandum. No funds were set aside, no financial projections were made, no filings were prepared or made and no procedures were established for monitoring the availability of funds or for handling potential claims. From an administrative perspective, there was no change from the prior, unwritten, purely *ad hoc* approach. R. 1387-1389, 477-79.

Schonholz' Termination

Dr. Match and Ms. Schonholz have testified that some time before December 18, 1992, Ms. Schonholz was informed of Dr. Match's intention to request her resignation effective April 1, 1993. *Id.*, R. 565-67, 1049-50. When a high level LIJ administrator was fired, it was the usual practice for the employee's supervisor to inform the employee of the

termination, but to allow the employee to submit his or her resignation voluntarily. R. 1136-37. The "resignation" process was followed as an accommodation to the person being terminated in order to facilitate the employee's reemployment efforts. R. 1148-49.[4]

By letter dated December 18, 1992 (the "December 18 Letter"), Dr. Match requested Ms. Schonholz' resignation effective April 1, 1993. A-39. The letter stated that:

> the terms of your severance will be governed by the LIJ Medical Center personnel policies applicable to members of the President's Council, including the Severance Pay Program dated May 3, 1991. At your option, the initial twelve months of severance pay may be taken in one lump-sum payment on the day of your termination of [*sic*] bi-weekly over the twelve months after your termination.

Id.[5] By letter dated December 22, 1992, Ms. Schonholz submitted her letter of resignation effective April 1, 1993. R. 125.

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[4] Ms. Schonholz has admitted that, notwithstanding the fact that the administrator was allowed to submit a resignation, at the time the employee was asked to resign, the person would know that he or she was fired. The employee thus lacked the "leverage" to bargain, negotiate or the like -- the termination terms, if any, were a matter of grace. In the words of Ms. Schonholz, once the resignation was requested, "it was over." Ms. Schonholz testified that she resigned because she had no other choice and because it would make her employment search easier. She did not attempt to bargain or negotiate with Dr. Match, or to in any way to change his mind. The existence of the severance pay program was therefore irrelevant to her decision to "resign." R. 1090-1093.

[5] Dr. Match's December 18 letter offer of a "lump sum payment" to Schonholz is revealing. A-39. The May 3 Memorandum -- the claimed severance plan predicate -- did not so provide; it provided, instead that severance benefits "shall be paid on a biweekly basis ...." A-36. Dr. Match explained that he unilaterally determined to vary the May 3 Memorandum to conform to what he understood had been done in other

(Footnote continued)

Significantly, however, even before the conversation between Ms. Schonholz and Dr. Match and their exchange of resignation letters, Ms. Schonholz had been in communication with an executive search firm soliciting its assistance in finding a new job. A-38. Stating that she had already determined to leave LIJ, Ms. Schonholz expressed her willingness to consider employment even in an unrelated field. *Id.*

The LIJ Board Learns of the May 3 Memorandum

Almost two years after issuance of the Severance Memorandum and some three months after the resignation letter exchange between Dr. Match and Ms. Schonholz, in March 1993, LIJ's Board of Trustees learned for the first time of the May 3 Memorandum (R. 1429-31), as well as the December 1992 exchange of correspondence between Dr. Match and Schonholz (R. 627). At its next regular meeting -- on March 23, 1993 -- the LIJ Board was presented with and considered the May 3 Memorandum. R. 1431. The Trustees, who were shocked to learn of the existence of the purported severance program and the December exchange of correspondence between Ms. Schonholz and Dr. Match (R. 1429), adopted, by an overwhelming vote, a resolution declaring the May 3 Memorandum null and void, and revoking it as unauthorized and invalid. R. 352-62, 633-34.[6]

Ms. Schonholz received notice, both orally and in writing, of the revocation from Dr. Match prior to her termination. R.

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instances (involving the *ad hoc* procedures, individuals and events predating the May 3 Memorandum). R. 622-24.

[6] The minutes of that March 23 meeting indicate, that, after considerable discussion:

> [u]pon motion duly made, seconded and adopted, the Board declared that the purported May 1991 severance pay policy for members of the President's Council is declared invalid, null and void and never to have been effective...

R. 361.

1179-80, 635-636, 1202-03.[7] Having revoked the purported severance program on March 23, 1993, the Board indicated that it would evaluate to what extent and under what circumstances Ms. Schonholz would be provided any severance benefits in a fashion similar to prior (and subsequent) termination cases (*i.e.*, on a discretionary case-by-case basis, with the discretion being exercised by the Board's Compensation Committee or a Committee drawn largely therefrom). R. 721, 417.

History of the Action

On or about June 11, 1993, Ms. Schonholz commenced this action against LIJ and various individual defendants who served as uncompensated members of LIJ's Board of Trustees, alleging jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132. R. 32-40. Ms. Schonholz sought to recover from LIJ and the individual defendants severance benefits allegedly due her, as well as punitive damages and attorneys' fees. Thereafter, in addition to this litigation, Schonholz also commenced proceedings against LIJ before the U.S. Equal Employment Opportunity Commission (Charge No. 60940066) charging age discrimination. That action was dismissed by the Commission on a finding that Ms. Schonholz had, in fact, resigned. Ms. Schonholz did not appeal or seek review of that determination.

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[7] On March 29, 1993, Dr. Match wrote the following letter to Schonholz and to *each* of the eight recipients of the May 3 Memorandum:

> It has recently come to the attention of the Board of Trustees of the Medical Center that a memorandum was circulated to the members of the President's Council in 1991 which purported to establish a severance pay program for these employees. Please be advised that this severance pay program was never approved or adopted by the Board and is deemed invalid and null and void and never to have been effective. The Medical Center will not be bound by its provisions.

R. 127.

On or about July 30, 1993, defendants moved to dismiss the complaint in its entirety, under FRCP Rule 12(b)(6), for failure to state a claim upon which relief may be granted. By memorandum and order dated February 18, 1994, the District Court granted in part and denied in part LIJ's motion to dismiss. A-24-32. Ms. Schonholz' claims against the individual defendants were dismissed with prejudice, as were her claims for punitive damages. The District Court also dismissed the second cause of action (based on estoppel), but granted Ms. Schonholz leave to amend to specify with particularity her reliance claims. Given the state of the pleadings and the scope of a Rule 12(b)(6) motion, the District Court denied the motion to dismiss the first cause of action (the claim to enforce the May 3 Memorandum under ERISA) simply because LIJ's pleading failed to aver that Ms. Schonholz received notice of the Board's revocation of the May 3 Memorandum.

On or about March 7, 1994, Ms. Schonholz filed the Amended Complaint, which now involved only two parties (Ms. Schonholz and LIJ) and two causes of action (ERISA and estoppel). R. 24-31.

On August 30, 1994, LIJ moved for an order granting it summary judgment, dismissing Ms. Schonholz' claims for lack of subject matter jurisdiction and for failure to state a claim. R. 46-47. On or about September 16, 1994, Ms. Schonholz cross-moved for summary judgment, arguing that all of the facts necessary to decide in her favor had been established and that she was entitled to summary judgment as a matter of law. R. 56-57.

By Memorandum-Decision and Order dated February 3, 1995, Judge Bartels (1) denied LIJ's motion for summary judgment for lack of subject matter jurisdiction; (2) granted LIJ's motion for summary judgment for failure to state a claim; (3) denied Schonholz' cross-motion for summary judgment; and (4) dismissed the action in its entirety. A-16-23.

Judge Bartels granted LIJ's motion for summary judgment on Ms. Schonholz' first cause of action under ERISA. He

based this decision on the undisputed fact that "LIJ had established that its revocation of the Program was in writing and plaintiff admits that she had both oral and written notification of the LIJ Board's revocation of the Program prior to the effective date of her termination." A-19. In addition, Judge Bartels completely rejected Ms. Schonholz' bad faith and fiduciary duty theory, holding that the single case Ms. Schonholz cited in support of this theory stood "against the weight of authority." A-19-21.

Turning to Ms. Schonholz' common law claims, Judge Bartels likewise granted LIJ's summary judgment motion. Judge Bartels rejected Ms. Schonholz' contractual vesting theory, based on Dr. Match's letter, on two grounds. First, he held that, "although an employer may establish by contract that certain benefits are vested, it may only do so in formal plan documents," and "[c]learly Dr. Match's [December 18, 1992] letter is not a formal plan document." A-21-22. Therefore, Dr. Match's letter could not contractually vest the Program's benefits. Secondly, Judge Bartels held that "even if the Court were to consider Dr. Match's letter to be a Plan document, the letter does not explicitly waive LIJ's rights to terminate benefits." *Id.*

Finally, Judge Bartels rejected Ms. Schonholz' promissory estoppel theory on the ground that she could not demonstrate any detrimental reliance or injury. A-23.

The United States Court of Appeals for the Second Circuit affirmed the district court's finding that the Program constituted an ERISA welfare benefits plan for ERISA pre-emption purposes. A-6. The court, however, reversed the district court's grant of summary judgment, finding several triable issues of fact existed. Specifically, the court reversed the district court's holding regarding the contractual vesting issue and held that the December 18 letter could be found by a trier of fact to constitute a sufficiently formal promise on the part of LIJ to bind LIJ under a contractual vesting theory.

The Second Circuit agreed with the district court that a cause of action for promissory estoppel exists under ERISA.

A-12. The Second Circuit, however, reversed the district court's dismissal of the promissory estoppel claim. The court found that, even though Ms. Schonholz was involuntarily terminated, a trier of fact could find that she relied on Dr. Match's December 18 letter in deciding to resign. The Second Circuit also held that a trier of fact could reasonably find that, by agreeing to resign, Ms. Schonholz forfeited something, and, as a result, was injured by virtue of her reliance. Accordingly, the Second Circuit remanded the case to the district court.

Thus, the Court of Appeals held that the federal courts have subject matter jurisdiction of this case because it comes within ERISA, and that Schonholz's claim of promissory estoppel stated a claim under that statute. Petitioner seeks *certiorari* to review those conclusions.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case dramatically alters the test for determining ERISA pre-emption as set out by this Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). According to the Second Circuit's formulation, whenever an employer's offer of severance benefits -- no matter how limited in scope -- allows for the exercise of any discretion on the employer's part, the employer must comply with all of ERISA's substantive and procedural requirements -- regardless of whether any plan or administrative program is implicated. That is not what this Court held in *Fort Halifax*.

This case will permit this Court to correct the Second Circuit's misstatement of the law and to provide much needed clarification of the *Fort Halifax* test as to which the circuits have expressed confusion and disagreement.

In addition, by recognizing a cause of action for promissory estoppel under ERISA, the Second Circuit exacerbated a split among the circuits on the issue of whether such a cause of action exists. The existence of such a split undermines the purpose of ERISA pre-emption -- to provide a consistent, uniform set of requirements and rules. This case, then,

provides this Court with an opportunity to resolve that confusion and disagreement as well.

I. Review of This Case is Necessary to Correct the Second Circuit's Misconstruction of the *Fort Halifax* Test and to Provide Much Needed Clarification to the Circuits

In *Fort Halifax*, this Court held that the term "employee welfare benefit plan" -- the jurisdictional nexus under ERISA -- does not apply to every undertaking by an employer to provide employees with severance benefits; instead, it extends only to those undertakings which require the creation of an "ongoing administrative program." 482 U.S. at 16.

Fort Halifax involved a Maine statute that required employers, in the event of a plant closing, to provide a one-time severance payment to employees who were not covered by a contract that dealt with the issue of severance pay. In holding that ERISA did not pre-empt the Maine statute, this Court focused on both the statutory language and the policy behind ERISA pre-emption.

Thus, this Court noted that ERISA's pre-emption provision specifically refers to "employee benefit *plans*," not simply to "employee *benefits*," and that the terms "plan" and "benefits" are used distinctly throughout the statute. *Id.* at 7-8 (quoting 29 U.S.C. § 1144(a), adding emphasis). The Court then looked to the purpose behind ERISA pre-emption and the regulatory scheme as a whole to conclude that the hallmark of an ERISA "plan" -- as contrasted with "benefits" -- is that a plan requires an "ongoing administrative program." *Id.* at 11-12. "Only 'plans,'" this Court held, "involve administrative activity potentially subject to employer abuse." *Id.* at 16. The severance pay scheme in *Fort Halifax*, however, did not involve a "plan" because it

> generates no such activity. There is no occasion to determine whether a "plan" is "operated" in the interest of its beneficiaries, because nothing is "operated." No financial transactions take place that

> would be listed in an annual report, and no further information regarding the terms of the severance pay obligations is needed because the statute itself makes these terms clear. It would make no sense for pre-emption to clear the way for exclusive federal regulation, for there would be nothing to regulate.

Id. at 16.

Pre-emption, this Court concluded, was intended to "'eliminat[e] the threat of conflicting and inconsistent State and local regulation.'" *Id.* at 9 (quoting 120 Cong.Rec. 29197 (1974)). An employer that commits to paying certain benefits on a systematic basis "undertakes a host of obligations" and the most efficient method for an employer to meet its responsibilities is by establishing a "uniform administrative scheme, which provides a set of standard procedures to guide the processing of claims and disbursement of benefits." *Id.* However, employers would, as this Court observed, have great difficulty establishing such a scheme if they were subject to differing obligations and regulations imposed by different States.

> A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.

Id. If employers were subject to such a "patchwork scheme of regulation," they would encounter serious inefficiencies in operating benefit plans, and those with existing plans might choose to reduce benefits, and those without plans might refrain from adopting them. *Id.* at 11.

> Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the

> employer's obligation. It is for this reason that Congress pre-empted state laws relating to *plans*, rather than simply to *benefits*. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

Id. at 11-12. (Emphasis in original.) Thus, this Court ruled, ERISA did not pre-empt the Maine statute, since "[n]either the possibility of a one-time payment in the future, nor the act of making such a payment, in any way creates the potential for the type of conflicting regulations of benefit plans that ERISA pre-emption was intended to prevent." *Id.* at 14.

The Fifth and Eighth Circuits have consistently adhered to the *Fort Halifax* analysis, looking to the existence of an "ongoing administrative program" as the determinant of ERISA pre-emption, and rejecting arguments that schemes involving a handful of "beneficiaries," or single or formulated payment approaches constituted cognizable "plans" requiring the imposition of ERISA's burdens and regulatory oversight, as well as attendant pre-emption[8]. The Second Circuit was in accord until the decision here sought to be reviewed.[9]

Other courts, however, have openly struggled to find a more elastic basis for invoking pre-emption. *See Simas v. Quaker Fabric Corp.*, 6 F.3d 849 (1st Cir. 1993); *Pane v. RCA Corporation*, 868 F.2d 631 (3d Cir. 1989); *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993). *But cf.*, *Belanger v. Wyman-Gordon Company*, 71 F.3d 451 (1st Cir. 1995), with *Simas*, 6 F.3d at 854; *Angst v. Mack Trucks*, 969 F.2d 1530 (3d Cir. 1992), with *Pane*, 868 F.2d at 635; and *Delaye v. Agripac, Inc.*, 39

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[8] *See, e.g., Kulinski v. Medtronics Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994); *Fontenot v. NL Industries*, 953 F.2d 960 (5th Cir. 1992).

[9] *Compare Schonholz, supra*, with *James v. Fleet/Norstar Financial Group, Inc.*, 992 F.2d 463 (2d Cir. 1993). *See also Mullins v. Pfizer*, 23 F.3d, 663-666 (2d Cir. 1994); *Ackner v. Lenox, Inc.*, 782 F. Supp. 267 (S.D.N.Y. 1992).

F.3d 235 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995), with *Bogue*, 976 F.2d at 1323.

Generally, without regard to the existence of any "ongoing administrative program," much less focusing upon the distinction between "plans" and "benefits," the courts advocating a more expansive approach have largely settled upon an alternative standard, finding ERISA pre-emption applies where any managerial "discretion" exists or may arise in determining severance benefits.[10]

To illustrate, in *Pane*, ERISA pre-emption was invoked when the employer refused to grant a single employee a severance agreement. The district court held that, because the employer had discretion to determine whether to grant the employee a severance agreement, which, if granted, might equate him with a potential class of other participants, an ongoing administrative program would then be required, which in turn implicated ERISA. *Pane*, 667 F. Supp. 168, (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3rd Cir. 1989).

A similar approach was utilized in *Bogue*. There, as an incident of a corporate merger, the employer told a handful of senior executives that, if the successor entity did not offer "substantially equivalent" employment -- a defined term -- and their employment was terminated, they would then receive specified severance benefits for a finite period of time. The employee accepted a new position with the successor entity. However, claiming that the new position that he had accepted was not "substantially equivalent" to his former job, he also sought the severance benefit. Holding that application of the defined term "substantially equivalent" involved "discretion," the Third Circuit sustained ERISA pre-emption on the theory that such discretionary act now implicated ERISA's regulatory and filing requirements. *Bogue*, 976 F.2d at 1323. *See also Simas*, 6 F.3d at 854 (applying *Bogue*

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[10] *See Pane*, 868 F.2d at 635, *affirming, Pane v. RCA Corporation*, 667 F. Supp. 168, 170-171 (D.N.J. 1987), and *Bogue*, *supra*, 976 F.2d at 1322-24.

analysis to find ERISA pre-empted Massachusetts "tin parachute" statute on ground that statute required non-mechanical decision-making).

Significantly, in more recent decisions, the First, Third and Ninth Circuits have all taken pains to distinguish their prior decisions in *Simas*, *Pane* and *Bogue*, thus exacerbating the confusion over the test to be applied.[11]

A similar conflict occurs in the Second Circuit. In *James*, *supra*, multiple employees were to receive severance payments over extended time periods. The Second Circuit, however, held that this did not meet the "ongoing administrative program standard under *Fort Halifax* in that the employer's need to make simple arithmetical calculations as to benefits amounts did not require 'establishment of a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits' (*Fort Halifax* 482 U.S. at 9), the protection of which is the purpose of ERISA pre-emption." *James*, 992 F.2d at 466. *See also Mullins*, 23 F.3d at 666.

The instant case, however, places the Second Circuit in the intra-circuit conflict column. Here, the retiring President of a not-for-profit hospital issued a memorandum and referring to some eight managers appointed as his inner circle of advisers, but which in fact has implicated only one, provided that specified and finite benefits would be awarded on termination for other than cause -- the "golden parachute." No administrative program was contemplated or resulted; no financial statements were considered or prepared, no moneys set aside, no filings made, no further information distributed; nothing further was done. Indeed, the Board of Directors of the hospital-employer was not even told what had transpired (much

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[11] Compare *Belanger v. Wyman-Gordon Company*, 71 F.3d 451 (1st Cir. 1995), with *Simas*, 6 F.3d at 854; *Angst v. Mack Trucks*, 969 F.2d 1530 (3d Cir. 1992), with *Pane*, 868 F.2d at 635; and *Delaye v. Agripac, Inc.*, 39 F.3d 235 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995), with *Bogue*, 976 F.2d at 1323.

less asked to approve the scheme) until after the single employee had sought benefits. Nonetheless, the Second Circuit here holds that ERISA attaches -- and with it the burdens of employer filings and the like -- where the determination as to whether benefits will or will not be granted "necessitated both managerial discretion and a separate analysis of each employee in light of certain criteria." A-7-8.

The issue here tendered is important and of considerable reach.

ERISA imposes extensive and ongoing fiduciary obligations and compliance requirements on employers.[12] In *Fort Halifax*, this Court held that those burdensome obligations were not Congressionally intended to be and should not be imposed absent the need for an "ongoing administrative program," something (*i.e.*, a plan) that calls for regulation and can be regulated. And the rationale expressed is that, because an "ongoing administrative program," with all of its burdensome trappings is thus required, pre-emption is required in the interest of regulatory consistency and to ease the undue employer burden.

Neither the holding nor the reasoning of *Fort Halifax* supports the test applied by the Second Circuit here. The mere possibility that a manager may have to exercise discretion in determining whether to extend an offer of benefits does not, without more, transform an offer of severance "benefits" into an ERISA "plan." Certainly, if the Second Circuit's holding is to govern, then in all but a handful of instances where severance can be claimed (a) the employer will run the risk of having omitted to comply with ERISA, and (b) a simple contract issue will be subject to federal jurisdiction and the common law it will develop.[13] This was not Congress's intent.

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[12] *See, e.g.*, 29 U.S.C. §§ 1021-1025, 1102-1105, 1109.

[13] It will also implicate ERISA's attorneys fee proviso [29 U.S.C. § 1132(g)], and thus provide an added layer of cost.

In any event, if this more elastic view -- which focuses upon whether discretion exists to award benefits, even to a single employee, or to make mathematical or like computations -- is to be the rule, then employers should know, so that they can properly weigh the burdens imposed by ERISA against the appropriateness of granting or continuing severance approaches. *See Fort Halifax*, 482 U.S. at 11. Otherwise, unsuspecting employers run the risk of being in default in failing to comply with ERISA. Employers may not only find themselves embroiled in federal court litigation with, as here, its creation of a body of law that is at variance with the common law of that state or jurisdiction, but, in some instances at least, face potential $1,000 per day fines for failure to comply with ERISA's annual reporting requirements. *See* 29 U.S.C. § 1132(c)(2).

This Court in *Fort Halifax* noted:

> Some severance benefit obligations by their nature necessitate an ongoing administrative scheme, but others do not. Those that do not...simply do not involve a state law that "relate(s) to" an employee benefit "plan."

482 U.S. at 19. If the availability of discretion whether to grant or withhold benefits is now to be the determinant as to whether a plan exists and an ongoing administrative program is implicated -- rather than the *Fort Halifax* standard that the Second Circuit viewed as "opaque" -- then employers, employees and the courts should know that from this Court, rather than continue the conflicts that now exist.

II. Review of the Second Circuit's Decision is Necessary to Resolve a Split in the Circuits on the Issue of Whether a Federal Common Law Cause of Action for Promissory Estoppel Exists Under ERISA

Federal circuit courts are divided on the recurring issue of whether a federal common law cause of action for promissory estoppel exists under ERISA. That division extends beyond

severance and increasingly embraces a variety of employee benefits.

Thus, the Second Circuit's decision in this matter conflicts with decisions of the Fifth, Ninth, Tenth and Eleventh Circuits, which have all refused to recognize a claim for promissory estoppel under ERISA. In addition to the Second Circuit, the Seventh Circuit and Third Circuit have recognized a claim based on promissory estoppel under ERISA. This Court has never addressed the issue.

The majority of jurisdictions have found no cause of action for promissory estoppel under ERISA. *See DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1381 (1995); *Miller v. Coastal Corp.*, 978 F.2d 622 (10th Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Degan v. Ford Motor Company*, 869 F.2d 889 (5th Cir. 1989).

These courts have noted that ERISA's comprehensive remedial scheme does not provide a cause of action for promissory estoppel. They have further noted that, while this Court has sanctioned the development of federal common law to fill interstitial gaps in the statutory scheme [*see, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, (1989)], the authority to develop common law is "'not the authority to revise the text of the statute.'" *DeVoll*, 35 F.3d at 412, quoting *Mertens v, Hewitt Assocs.*, 508 U.S. 248, 259, (1993).

ERISA's express requirements that every employee benefit plan "be established and maintained pursuant to a written instrument" (29 U.S.C. § 1102(a)(1)), and that the written plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan" (29 U.S.C. § 1102(b)(3)), provide evidence that Congress did not intend to permit plans to be informally modified or amended based on promises of employers or plan administrators. *See, e.g., Alday*, 906 F.2d at 665; *Degan*, 869 F.2d at 895. Thus, to recognize claims based on promissory estoppel would be to revise the statute.

In addition, courts that have refused to recognize a claim for promissory estoppel have cited the following policy concern: permitting informal modifications to a plan based on representations made by an agent of the employer or plan may threaten the integrity of the plan at the expense of other participants or beneficiaries. As the court in *Degan* stated:

> Applying the common-law concept of estoppel would mean presenting retirement plan administrators with claims for payment from individuals, otherwise ineligible, who were parties to oral agreements that, like the one before us, have lain unsuspected and inert for years. That prospect would threaten the stability and solvency of many plans upon which so many other employees are dependent.

869 F.2d at 895.

In *Devoll*, for example, plaintiff claimed that when the company for which he worked opted out of a collective bargaining agreement and became a non-union employer, its president assured him and other employees that they would continue to receive the same level of benefits they had received as union workers. Sometime later, the company changed its medical benefits plan. When plaintiff was denied coverage for a procedure that would have been covered under the previous union plan, he brought an action asserting among other things, a claim based on promissory estoppel.

The Ninth Circuit held that plaintiff's state law claim based on promissory estoppel was pre-empted and declined plaintiff's invitation to fashion a federal common law claim under ERISA based on promissory estoppel. The court cited to this Court's decision in *Mertens v. Hewitt Assocs.*, *supra*, for the proposition that the authority to create federal common law under ERISA is not the authority to revise the statute, and to *Olson v. General Dynamics Corp.*, 960 F.2d 1418 (9th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992), for the proposition that Congress, not the courts, is properly charged with filling gaps in the statute.

Similarly, in *Miller v. Coastal Corp.*, *supra*, plaintiff alleged that, when he accepted a position as a salaried employee, he was assured that, for purposes of calculating his pension benefits, the company would treat his years of service as a union employee as if he had been a salaried employee. For a period of ten years, plaintiff received written statements that calculated his benefits in a manner consistent with the assurances he had received. Upon plaintiff's retirement, however, defendants refused to treat plaintiff's time as an hourly union employee as if he had been a salaried employee.

The Tenth Circuit refused to recognize plaintiff's estoppel-based claim, even though in this instance it was based on written statements. The court stated:

> As we indicated in [*Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988)], we will not import notions of promissory estoppel into ERISA . . . . We hold that there is no liability under ERISA for purported informal written modifications to an employee benefit plan.

978 F.2d at 625. (Citations omitted.) *See also Alday*, 906 F.2d at 666 (no federal common law right to promissory estoppel in Eleventh Circuit); *Degan*, 869 F.2d at 895 ("Hence, we join the other circuits that have held, consistently with the words of the statute, that ERISA precludes oral modifications to benefit plans and that claims of promissory estoppel are not cognizable in suits seeking to enforce rights to pension benefits.")[14]

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[14] In addition, other circuits (*e.g.*, the First and Eighth Circuits), while falling short of holding that no claim for promissory estoppel exists under ERISA, have recognized estoppel-based claims only when (a) the terms of the plan are ambiguous, and (b) the alleged representation at issue constitutes an interpretation of the ambiguity. *See Slice v. Sons of Norway*, 34 F.3d 630, 634 (8th Cir. 1994); *Law v. Ernst & Young*, 956 F.2d 364, 367-68 (1st Cir. 1992). The Ninth and Eleventh Circuits also recognize the use of equitable estoppel under those limited circumstances. *See Devoll*, 35 F.3d at 412; *Kane v. Aetna Life Ins.*, 893 F.2d 1283 (11th Cir. 1990), *cert. denied*, 498 U.S. 890 (1990).

In addition to the Second Circuit in this case, the Seventh Circuit and Third Circuit have recognized a federal common law cause of action under ERISA based on promissory estoppel. *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 58 F.3d 896, 907-08 (3d Cir. 1995)(claims for estoppel may exist under "extraordinary circumstances").

In *Miller v. Taylor*, for example, the Seventh Circuit found a federal common law cause of action for promissory estoppel based on written promises regarding the plaintiff's right to participate in defendant's plans. When the plaintiff in *Miller v. Taylor* retired from the defendant company, he entered into a ten-year "Consultation and Non-Competition Agreement," which provided, among other things, that, for the period the agreement was in effect, plaintiff would be entitled to participate in the medical reimbursement plan that was in effect at the time of his retirement. With two years remaining on the ten-year agreement, the defendant switched insurance carriers, and plaintiff was not listed as a participant under the new medical plan.

The Seventh Circuit held that plaintiff had stated a cognizable cause of action for promissory estoppel under ERISA, noting:

> Promissory estoppel is, in the view of this circuit at any rate, a part of the common law that we have been told (for example in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S. Ct. 948, 954, 103 L. Ed.2d 80 (1989)) to create in order to plug gaps in ERISA.

39 F.3d at 758. (Additional citations omitted.) The court acknowledged that, in a sense, "using promissory estoppel to allow into a written plan someone excluded by its terms amounts to an oral modification of the terms of a written plan." *Id.* at 759. The court articulated the policy against oral modifications as follows:

> The main objection to oral modifications, however, is that they would enable the plan's integrity and possibly its actuarial soundness, to be eroded by relatively low-level employees who in response to inquiries about the scope of coverage advise participants that a particular medical procedure is covered, even though the plan is explicit that it is not covered.

39 F.2d at 759. However, the court reasoned that the concern for protecting the integrity of an ERISA plan is diminished when the representation at issue goes to whether a particular individual is a participant in the plan, as contrasted with a representation regarding the coverage afforded by a plan, as a promise regarding participation is less likely to come from a low-level employee.[15]

ERISA is a "comprehensive and reticulated statute" that provides a detailed remedial scheme. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). ERISA does not, by its terms, provide a cause of action based on promissory estoppel. Furthermore, its requirements that plans be in writing and include amendment procedures evidence Congress's intent that courts not permit modifications of plans based on alleged promises that conflict with the plan. While this Court has authorized courts to fashion federal common law to fill interstitial gaps, recognizing a cause of action for

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[15] The Sixth Circuit has incorporated equitable estoppel principles into the federal common law of contracts, and in *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991), the Court held that the defendant company was estopped from exercising its right to terminate certain retiree insurance benefits because of certain representations it had made indicating that the benefits would continue to be provided. The court noted that the concern for protecting a fund's integrity is not present when dealing with retiree insurance benefits because the company's obligation is to pay premiums, not to maintain a fund from which retirees or their dependents are compensated in the event of death or illness.

promissory estoppel goes beyond gap filling and threatens to revise the statute.[16]

The Court of Appeals' decision in this case offers no analysis to support its recognition of a claim for promissory estoppel. The court merely noted that it had previously held that claims for promissory estoppel were cognizable under "extraordinary circumstances," citing *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993), but gave no indication as to what may constitute "extraordinary circumstances," and made no effort to reconcile its holding with the statutory language or contrary case law.[17]

There is, therefore, no rational basis for carving out an exception to ERISA's written amendment requirements for promises that pertain to vesting and participation. Indeed, the December 18 letter at issue here could very well represent the type of "side agreement" that ERISA's amendment requirements were intended to prevent. Permitting a claim based on the alleged promise would benefit the party to the agreement at the expense of other employees -- the precise result that ERISA's requirements were intended to avoid.

A clear division exists among the circuits as to whether courts may fashion a federal common law remedy based on promissory estoppel under ERISA. The importance of a definitive resolution of that division is readily demonstrable.

ERISA's pre-emption provision, which directs that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" (29 U.S.C. § 1144(a)), has been described as "conspicuous for its breadth." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). (Citations omitted.) Congress's intent, as this Court has noted, was "to ensure that plans and plan sponsors

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[16] *Cf. Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996).

[17] *Lee* provides no further illumination, as the Court there simply held that the plaintiff had not alleged facts establishing extraordinary circumstances.

would be subject to a uniform body of benefits law." *Id.* at 142. *See also Fort Halifax*, 482 U.S. at 9.

Given Congress's intent to achieve uniformity and to avoid the development of inconsistent bodies of law under ERISA, it is axiomatic that federal common law should be consistent. *See Singer v. Black & Decker Corp.*, 964 F.2d 1449 (4th Cir. 1992). Otherwise, the same employer may find itself subject to different rules in different jurisdictions -- one of the evils Congress sought to avoid. *See Fort Halifax*, 482 U.S. at 9.

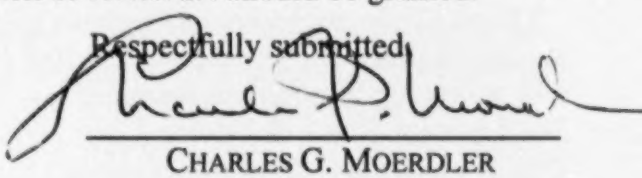
In light of the existing conflict among the circuits on the issue of promissory estoppel, certain employees of a multi-state company may have a cause of action based on alleged promises made by agents of the employer, but other employees of the same company may find themselves with no cause of action simply by virtue of their being in a different circuit. Additionally, such divisions and the attendant confusion and disparities will necessarily enhance employer burdens (and, concomitantly, lessen the inclination to grant or continue employee benefits), which, as this Court noted in *Fort Halifax*, Congress sought to avoid.

Therefore, in order to effectuate the intent of Congress, this Court should grant *certiorari* in this case and resolve the existing conflict and confusion.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 234 -- August Term 1995

(Argued October 20, 1995 Decided June 26, 1996)

Docket No. 95-7269

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GLENISS S. SCHONHOLZ,

Plaintiff-Appellant,

-- v. --

LONG ISLAND JEWISH MEDICAL CENTER,

Defendant-Appellee.

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B e f o r e: MESKILL, MAHONEY, and WALKER, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Bartels, *J.*), reported at 889 F. Supp. 610 (E.D.N.Y. 1995), finding that the district court had subject matter jurisdiction over plaintiff's claims under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*, but granting defendant summary judgment on those same claims.

Affirmed in part, vacated in part, and remanded.

ANTHONY M. RADICE, New York, NY (William E. Zuckerman, Morrison & Foerster, New York, NY, on the brief), *for Plaintiff-Appellant*.

CHARLES G. MOERDLER, New York, NY (Albert M. Appel, Sandra Jefferson Grannum, Robert C. Kern, Jr., Stroock & Stroock & Lavan, New York, NY on the brief), *for Defendant-Appellee*.

WALKER, *Circuit Judge*:

Plaintiff Gleniss S. Schonholz appeals from a judgment of the United States District Court for the Eastern District of New York (John R. Bartels, *District Judge*) in favor of defendant Long Island Jewish Medical Center ("LIJ") in her suit for severance benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. For the reasons stated below, we affirm in part, vacate in part, and remand.

BACKGROUND

On May 3, 1991, Dr. Robert K. Match, then-President of LIJ, announced in a memorandum to senior employees the details of a severance pay program (the "Severance Plan") that provided for payments to senior-level employees upon their involuntary discharge. Payments under the Severance Plan were to be based upon both the length of the time the employee held his position and his prospects for reemployment, but they would be made only if the employee displayed a reasonable and good faith effort to obtain a position commensurate with his former level of responsibility. In addition, the employee would not be eligible for payments under the Severance Plan if the termination was for either illegal conduct or substantially deficient performance. The Severance Plan provided that the terminated employee would continue to receive other benefits, and contained no provision for its termination or amendment. Apart from those discussed below, LIJ neither created nor circulated any documents purporting to amend, modify, or terminate the Severance Plan.

Schonholz was Senior Vice President and Chief Operating Officer of LIJ between 1987 and April 1, 1993. Schonholz's departure was precipitated by continuing disagreements in late 1992 between Schonholz and Irving Schneider, who at the time was Chairman of LIJ. Sometime between December 10 and December 18, 1992, Match informed Schonholz that he was going to ask for her resignation in the near future. Schonholz agreed that she would submit her resignation, to be effective April 1, 1993. This request was formalized in a letter from Match to Schonholz, dated December 18, 1992, which also stated:

> Of course, the terms of your severance will be governed by the LIJ Medical Center personnel policies applicable to members of the President's Council, including the Severance Pay Program dated May 3, 1991. At your option, the initial twelve months of severance pay may be taken in one lump-sum payment on the day of your termination or bi-weekly over the twelve months after your termination.
>
> Please arrange to meet with the Vice-Presidents of Finance and Human Resources to discuss and arrange the details.

The letter indicated that Match's request was due to changes in hospital management connected with his upcoming retirement and was unrelated to Schonholz's performance of her duties. In compliance with the request contained in the December 18 letter, Schonholz formally submitted her resignation, effective April 1, 1993, in a letter dated December 22, 1992.

On March 23, 1993, LIJ's Board of Trustees first became aware of the Severance Plan, the December 18 letter, and the December 22 letter. At a meeting that day, the Board of Trustees voted to revoke the Severance Plan. Match told Schonholz about the Board's decision the next day, March 24, and added that he thought that she would be contacted by LIJ shortly to discuss her severance arrangements. On March 29, Match wrote Schonholz to the effect that the Board had never

approved or adopted the Severance Plan, that the Severance Plan was "deemed invalid and null and void and never to have been effective," and that LIJ was not bound by the Severance Plan's provisions. In the letter, Match made no mention of alternative severance arrangements for Schonholz. No one from LIJ contacted Schonholz thereafter about her situation.

On June 11, 1993, Schonholz commenced this ERISA action below against LIJ and several individuals. LIJ and the other defendants moved to dismiss the case for failure to state a claim. In a memorandum and order, the district court dismissed the claims against the individual defendants without leave to amend, dismissed the ERISA-based promissory estoppel claim against LIJ with leave to amend, and struck the request for punitive damages. *Schonholz v. Long Island Jewish Medical Ctr.*, 858 F. Supp. 350 (E.D.N.Y. 1994) ("*Schonholz I*").

Following discovery and the filing of an amended complaint, LIJ and Schonholz cross-moved for summary judgment. The district court held that the Severance Plan was an employee welfare benefit plan within the meaning of ERISA, and that therefore federal subject matter jurisdiction existed. *See Schonholz v. Long Island Jewish Medical Ctr.*, 889 F. Supp. 610 (E.D.N.Y. 1995) ("*Schonholz II*"). However, the district court held that Schonholz's claims under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), were without merit as a matter of law. From this ruling Schonholz now appeals.

On appeal, Schonholz challenges the grant of summary judgment in LIJ's favor on the ERISA claims, and LIJ argues that the district court erred in finding subject matter jurisdiction. We turn to the jurisdictional issue first.

DISCUSSION

I. ERISA Subject Matter Jurisdiction

ERISA grants federal district courts concurrent jurisdiction over all claims by an "employee welfare benefit plan" beneficiary who seeks to "recover benefits due to him under the

terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) & (e)(1). LIJ contends that the Severance Plan does not constitute an employee welfare benefit plan under ERISA and that, therefore, the district court lacked subject matter jurisdiction over Schonholz's claims.

The term "employee welfare benefit plan" is defined by ERISA to include

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.

29 U.S.C. § 1002(1); *see* 29 U.S.C. § 1002(3). Because the district court held that the Severance Plan was within the definition of "employee welfare benefit plan" and thus determined jurisdiction as a matter of law, we review its finding de novo. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1016-17 (2d Cir. 1991).[1]

The term "employee welfare benefit plan" has been held to apply to most, but not all, employer undertakings or obligations to pay severance benefits. Yet, both the Supreme Court and this court have emphasized that ERISA applies only

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[1] LIJ did not cross-appeal from the district court's decision. Nonetheless, because we may raise the issue of subject matter jurisdiction *sua sponte*, *United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994), we reach LIJ's argument.

where such an undertaking or obligation requires the creation of an ongoing administrative program. For instance, in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987), the Supreme Court, faced with whether ERISA preempted[2] a Maine statute that required employers to make a one-time severance payment to employees upon a plant closing, held that the Maine statute did not create an employee welfare benefit plan and thus was not preempted. The Court stated: "The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits." *Id.*

Similarly, in *James v. Fleet/Norstar Financial Group, Inc.*, 992 F.2d 463 (2d Cir. 1993), we addressed whether an employer's undertaking to give employees severance pay was an employee welfare benefit plan. The employer had announced that one of its offices would be closed but told the workers in that office that, if they stayed on until the closing, they would receive sixty-days additional pay. In our view, the employer's promise did not constitute an employee welfare benefit plan because "the nature of the payments did not require an ongoing administrative employer program to effectuate them." *Id.* at 467. Other courts have reached a similar conclusion. *See, e.g., Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 454 (1st Cir. 1995) (ERISA implicated only if there are "continuing administrative and financial obligations"); *Simas v. Quaker Fabric Corp.*, 6 F.3d 849, 853-54 (1st Cir. 1993) (courts do not apply *Fort Halifax* where the state statute or employer promise creates "ongoing obligations"); *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992) (adopting approach that ERISA requires "administrative scheme"), *cert. denied*, 507 U.S. 1031 (1993); *Fontenot v. NL Indus., Inc.*,

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[2] Section 514(a) of ERISA, 29 U.S.C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any" employee welfare benefit plan. Thus, if the federal courts have jurisdiction over claims for recovery from a benefit plan, state law is preempted as to that plan.

953 F.2d 960, 962-63 (5th Cir. 1992) (same); *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989) (same).

But while it is plain that ERISA subject matter jurisdiction depends upon the need for an administrative program, the test for deciding which employer obligations and undertakings require such a program is opaque. *See Simas*, 6 F.3d at 854. In *James*, although the employer's payments to its employees would have to be calculated individually (because the circumstances of each employee differed as to eligibility, termination, and deductions), we said that the "need to make such simple arithmetical calculations did not" mean that the severance payment program was an employee welfare benefit plan. 992 F.2d at 467. However, deciding what is not an ongoing administrative program does not aid our determination of which obligations are complex enough to require such a program.

Other courts facing this same issue have looked to a variety of factors, including whether the employer's undertaking or obligation requires managerial discretion in its administration, *Bogue*, 976 F.2d at 1323; whether a "reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits," *Belanger*, 71 F.3d at 455; and whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria, *Fontenot*, 953 F.2d at 963 (citing *Pane v. RCA Corp.*, 667 F. Supp. 168, 170-71 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989)). We need not decide today which one or more of these factors will be determinative in every case because, in this case, we conclude that all of them favor Schonholz. *Cf. Belanger*, 71 F.3d at 455 ("There is no authoritative checklist that can be consulted to determine conclusively if an employer's obligations rise to the level of an ERISA plan.").

The Severance Plan required much more than the simple arithmetical calculations we held to be insufficient in *James*. The Severance Plan necessitated both managerial discretion and a separate analysis of each employee in light of certain

criteria. LIJ would have had to determine whether the employee was involuntarily terminated, and thus qualified for the Severance Plan; whether the termination was for either illegal conduct or substantially deficient performance; whether the employee was making a reasonable and good faith effort to obtain suitable employment elsewhere; and whether, if other employment had been found, it was commensurate with the employee's former organizational level and scope of responsibility.

There is also little doubt that a reasonable employee would have believed that the Severance Plan evidenced an ongoing commitment to provide severance benefits. Unlike the employer's obligation in *Fort Halifax* and the promise in *James*, the Severance Plan was not limited either to a single payment or to a short span of time upon a plan or office closing. The Severance Plan's effective period was unlimited and would have reasonably been perceived by an employee as an ongoing commitment. *Cf. Belanger*, 71 F.3d at 455 (finding no such commitment). Because all factors point to a finding that the Severance Plan is covered by ERISA, we affirm the district court's holding that it had subject matter jurisdiction.

II. ERISA Claims

Schonholz alleges that LIJ's refusal to pay her severance benefits violated § 1132(a)(1)(B) under two theories. Schonholz's first theory is that LIJ's December 18 letter and her December 22 response created a binding contract that vested her benefits. Her second theory is that LIJ was barred by promissory estoppel from denying her benefits.

The district court based its grant of summary judgment upon its belief that the letters between Schonholz and Match could not result in contractual vesting because they were only "informal communications" and not formal plan documents. In addition, the district court found that Schonholz's promissory estoppel claim failed because she could not demonstrate any injury.

It is well-settled that our review of the grant of a summary judgment motion is de novo, and reversal is required if "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see Hanson v. McCaw Cellular Communications, Inc.*, 77 F.3d 663, 667 (2d Cir. 1996). Because we find that genuine issues of material fact do exist as to both theories advanced by Schonholz, we vacate the district court's order and remand for further proceedings.

A. Contractual Vesting

Under ERISA it is the general rule that an employee welfare benefit plan is not vested and that an employer has the right to terminate or unilaterally to amend the plan at any time. *Reichelt v. Emhart Corp.*, 921 F.2d 425, 429-30 (2d Cir. 1990), *cert. denied*, 501 U.S. 1231 (1991). Nothing in ERISA, however, forbids or prevents an employer from agreeing to vest employee welfare benefits or from waiving its ability to terminate or amend unilaterally a plan, and several of our sister circuits have held that such agreements or waivers will be enforced. For instance, the Seventh Circuit has held that an agreement to vest employee welfare benefits will be upheld. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 604-05 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 291 (1993); *see id.* at 616 (Easterbrook, J. dissenting) (agreeing that parties may elect to vest employee welfare benefits by contract); *see also Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.) (employer may waive right to modify or terminate a plan), *cert. denied*, 114 S. Ct. 196 (1993); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876-77 (8th Cir. 1987) (employer may, under certain conditions, contract to vest employee welfare benefits); *In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) (same). We agree that there is nothing in ERISA preventing an employer from contracting to vest employee welfare benefits.[3]

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[3] LIJ argues that Schonholz never asserted a contractual vesting argument below and that it is therefore barred on appeal. Amended Brief for

(Footnote continued)

Not all undertakings by an employer to provide employee welfare benefits result in vesting, however. We previously have noted that ERISA was designed to "ensure[] that plans be governed by written documents filed under ERISA's reporting requirements and that [summary plan descriptions], drafted in understandable language, be the primary means of informing participants and beneficiaries." *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d cir. 1988). Courts that have allowed contractual vesting have required, at a minimum, that the employer's intent to vest the benefits be contained in a written document, although the employer's intent need not be stated unambiguously. *See Bidlack*, 993 F.2d at 608 (benefits could be vested by ambiguous language in a collective bargaining agreement when supported by extrinsic evidence); *Anderson*, 830 F.2d at 877 (rejecting oral "policy" statement as evidence of vesting of benefits and requiring instead a specific, if not written, expression of employer's intent to be bound). Other courts have gone further, requiring that the employer's decision to vest benefits be set forth clearly in the plan documents. *See Wise*, 986 F.2d at 937; *see also In re White Farm*, 788 F.2d at 1193 ("[T]he parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated."). LIJ contends that because the alleged contractual vesting was not part of any "formal plan document," Schonholz's claim must fail.

In each case cited by LIJ for the proposition that vesting must be included in formal plan documents, the employer had created such documents and distributed summary plan descriptions to the employees. But, in this case, LIJ created no

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Defendant-Appellee at 33. We disagree. The allegations in Schonholz's amended complaint can be read to set forth exactly such a theory even if it was not explicitly argued in the district court. In any event, we are not prevented from considering a new legal theory on appeal if, as with Schonholz's contractual vesting theory, we are not required to engage in additional factfinding. *See Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2d Cir. 1996).

such formal documents for the Severance Plan and, as LIJ notes, Department of Labor regulations do not require that the Severance Plan be maintained with the same level of formality that is required of most other employee welfare benefit plans. *See* 29 C.F.R. § 2520.104-24(a)(1). To require that LIJ's decision to vest the Severance Plan be included in the "formal plan documents," would also mean that LIJ and its employees would have to have memorialized that decision by amending formal plan documents that do not exist.

The Supreme Court has clarified that such an adherence to formalities is not mandated by the statute. Instead, "ERISA . . . follows standard trust law principles in dictating only that whatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level." *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1231 (1995). Therefore, any agreement to vest Schonholz's benefits would only have to be memorialized at the same level of formality that LIJ chose in promulgating the Severance Plan in the first place. In this case, the alleged promise was memorialized not in a formal plan document, but in the 1991 memorandum that Match sent to senior employees. We easily conclude that the December 18 and December 22 letters are at least as formal as the 1991 memorandum and that, therefore, the district court erred in concluding that Schonholz's claim is barred because "Match's letter is not a formal plan document." *Schonholz II*, 889 F. Supp. at 614.

We also disagree with the district court's holding that LIJ's commitment to vest Schonholz "must be in 'precise language denying the right to withdraw benefits.'" *Id.* at 615 (quoting *Wise*, 986 F.2d at 938). We do not think, at least in this case, that Schonholz is required to point to unambiguous language to support her claim. *See Bidlack*, 993 F.2d at 608-09. It is enough if she can point to written language capable of reasonably being interpreted as creating a promise on the part of LIJ to vest her severance benefits. Because the December 18 letter may be so interpreted by a trier of fact, we remand the contractual vesting claim to the district court.

B. Promissory Estoppel

We have previously held that the principles of estoppel can apply in ERISA cases under extraordinary circumstances. *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 993). The Second Restatement of Contracts defines promissory estoppel as "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance." Restatement (Second) of Contracts § 90(1) (1979). The Restatement further provides that such a promise is enforceable "if injustice can be avoided only by enforcement of the promise." *Id.* The First Restatement's formulation was similar: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement of Contracts § 90 (1932); *see also* 28 Am. Jur. 2d *Estoppel & Waiver* § 48 (1966) ("[A]n estoppel may arise from the making of a promise . . . if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would . . . result in . . . injustice.").

The basic elements of promissory estoppel therefore are (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced. LIJ argues, however, that to prevail, Schonholz must show that the promise contained in the first element is clear and unambiguous. It is true that New York law requires a clear and unambiguous promise, *see e.g.*, *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 301 (2d Cir. 1996) (applying New York law), but courts elsewhere in this circuit, relying on the Restatement, have formulated the first element in a different manner. The Supreme Court of Connecticut has required only the existence of "a clear and definite promise," *i.e.*, one which if "judged by an objective standard," the defendant had reason to expect reliance by the plaintiff. *D'Ulisse-Cupo v. Board of Directors of Notre Dame High Sch.*, 202 Conn. 206, 213 (1987). The Supreme Court of

Vermont has articulated the test as whether the plaintiff has shown a promise which the promisor should reasonably expect to induce reliance. *Stacy v. Merchants Bank*, 144 Vt. 515, 521 (1984). Outside this circuit, the New Jersey Appellate Division has similarly required only "a clear and definite promise made with the expectation that the promisee will rely." *Spaulding v. Hussain*, 229 N.J. Super. 430, 438 (App. Div. 1988).

ERISA is a federal law regime for regulating employee benefits designed to eliminate the threat of conflicting state and local regulation of benefit plans. *Fort Halifax*, 482 U.S. at 9. We are not bound by New York law and therefore see no reason to apply New York's formulation of the first element of promissory estoppel. In accordance with the unifying theme of the statute, we prefer the language of the present Restatement and require, for purposes of ERISA, only that Schonholz demonstrate a promise that LIJ reasonably should have expected to induce action or forbearance on her part. Under this standard, we conclude that a trier of fact reasonably could conclude that Schonholz has met her burden on the "promise" element; a jury properly could infer from the December 18 letter a promise on which LIJ should have expected that Schonholz would rely in tendering her resignation.

We have no difficulty in concluding that Schonholz has shown evidence of the second element of promissory estoppel -- reliance on the alleged promise. Schonholz's submission of her resignation just four days after the December 18 letter is, by itself, enough to create a triable issue as to reliance.

We also part company with the district court's finding that Schonholz is unable to demonstrate injury based on her reliance. *Schonholz II*, 889 F. Supp. at 615. Although LIJ was free to terminate the Severance Plan at any time absent any promise to vest Schonholz, the fact alone is not enough to defeat Schonholz's claim. If LIJ had not transmitted the December 18 letter, Schonholz might never have submitted her resignation. LIJ then would have had to choose between firing

Schonholz and keeping her on for an undetermined period. Each option presumably entailed disadvantages to LIJ because LIJ chose neither. For instance, firing Schonholz might have affected employee morale at LIJ and could have led to a very abrupt and turbulent transition from Schonholz to a new Chief Operating Officer, while permanent retention of Schonholz would most probably have resulted in a continuation of the same antagonism between Schonholz and Schneider that had precipitated the decision to ask for Schonholz's resignation in the first place. In other words, by agreeing to leave amicably, Schonholz conferred a benefit on LIJ, one that may be quantifiable. If Schonholz's cooperation until the end of March 1993 had been of no value to LIJ, Schonholz might have been terminated without any bargaining. Just as a benefit to LIJ is implicit in the bargaining that led to Schonholz's submission of her resignation letter, so also is a corresponding detriment to Schonholz in the form of the power to withhold that benefit -- something she gave up, presumably because severance benefits were being offered to her in exchange. It is this possibility of loss that a jury should be permitted to consider as injury to Schonholz in satisfaction of the third element of promissory estoppel.

Finally, we note that Schonholz must show "that enforcement of the promise must be necessary to avoid an injustice, presumably caused by the reliance." 4 Richard A. Lord, *Williston on Contracts* § 8:5 (4th ed. 1992). The district court did not address this element below, but we conclude that if Schonholz is able to prevail on the other three elements of promissory estoppel, she may prevail on this one as well. *Cf. C & K Eng'g Contractors v. Amber Steel Co.*, 23 Cal.3d 1, 11 (1978) (task of considering element of injustice is equitable one for court and not jury). Assuming that the jury concludes that LIJ promised to extend Schonholz's benefits, that LIJ should have known that Schonholz would rely, that Schonholz did in fact rely, and that Schonholz was injured by that reliance, it is clear to us that she will be able at least to contend that an injustice would result if the promise is not enforced.

Because we find that there are genuine issues of material fact on this claim, we remand it to the district court.

CONCLUSION

For the reasons stated above, we affirm the district court's exercise of subject matter jurisdiction, we vacate the district court's grant of summary judgment, and we remand the case for proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GLENISS S. SCHONHOLZ,

Plaintiff,

- against - : **93 CV 2549**

LONG ISLAND JEWISH MEDICAL CENTER,

Defendant.

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Bartels, U.S. District Judge.

MEMORANDUM-DECISION AND ORDER

Defendant Long Island Jewish Hospital ("LIJ") and plaintiff Gleniss S. Schonholz cross-move under Rule 56(c) of the Federal Rules of Civil Procedure for summary judgment. Schonholz brought this action pursuant to the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), to recover benefits allegedly owed to her under her former employer's severance benefit plan. LIJ seeks dismissal of Schonholz's claims for lack of jurisdiction and for failure to state a claim. Schonholz cross-moves for summary judgment, arguing that all of the facts necessary to decide in her favor have been established and that she is entitled to summary judgment as a matter of law.

BACKGROUND

Gleniss S. Schonholz was employed by the Long Island Jewish Medical Center from 1980 until 1993. Hired as a Divisional Administrator, by 1987, Schonholz had been promoted to the position of Senior Vice President and Chief Operating Officer of LIJ. During 1991 and 1992, hospital management changed and a new LIJ Board Chairman was

appointed. Due to the incompatibility of Schonholz and the new Chairman, the President and CEO of LIJ, Dr. Robert K. Match, determined that it was in the best interest of the hospital for Schonholz to resign. Dr. Match and Schonholz met some time between December 10 and December 18, 1992, and agreed that Schonholz would submit her resignation to become effective April 1, 1993. He formalized his request in a letter dated December 18, 1992. In his letter, Dr. Match explicitly stated that Schonholz would be eligible for severance pay benefits as detailed in a memorandum dated May 3, 1991. As requested, by letter dated December 22, 1992, Schonholz submitted her resignation. Nine days before the effective date of Schonholz's termination, on March 23, 1993, the LIJ Board revoked the severance pay program (the "Program"). On June 11, 1993, Schonholz commenced this action against LIJ to recover severance benefits.

DISCUSSION

I. Subject Matter Jurisdiction

LIJ challenges the sole basis of this Court's jurisdiction, asserting that the LIJ Program was not an "employee welfare benefit plan" within the meaning of ERISA. Severance benefit programs generally are covered by ERISA as they are expressly included in the definition of "employee welfare benefit plan" under 29 U.S.C. 1002(1). *See Bradwell v. GAF Corp.*, 954 F.2d 798, 800 n. 1 (2d Cir. 1992). LIJ argues, however, that the LIJ Program falls within the exception established by the Supreme Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1987), where the Court held that a single lump-sum severance payment payable only on the occurrence of a single event did not implicate ERISA. In order to fall within ERISA preemption, a benefit plan must require ongoing administration separate from other benefit plans administered by the employer.

LIJ argues that, because Dr. Match offered Schonholz a lump-sum payment of twelve months' salary in lieu of bi-weekly installments as provided by the Program, the Program falls within the *Fort Halifax* exception and no longer qualifies

as an ERISA plan. This argument, however, ignores other provisions of the Program. In addition to the first twelve months' salary, the Program provided another six months of salary for terminated employees with Schonholz's length of service who had not yet found "commensurate" employment after a year. The last six months' salary was to be paid bi-weekly until commensurate employment was found or the additional six months had expired, whichever occurred first. The Program defines commensurate employment as employment placing her at "h[er] former organizational level and scope of responsibility."

In determining what is and what is not an ERISA plan, courts have looked to the degree of managerial discretion in the award of benefits. *See, e.g., James v. Fleet/Norstar Financial Group, Inc.*, 992 F.2d 463 (2d Cir. 1993) (automatic lump-sum payment of 60 days of salary to employees terminated due to consolidation not an ERISA plan); *Fontenot v. NL Industries*, 953 F.2d 960 (5th Cir. 1992) (single lump-sum payment of 3 years' salary to executives terminated following takeover not an ERISA plan). *Compare Bogue v. Ampex Corp.*, 976 F.2d 1319, 1321 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1847 (1993) (severance benefits payable to 10 key employees if not offered "substantially equivalent" employment by buyer is plan governed by ERISA). "To do little more than write a check hardly constitutes the operation of a benefit plan." *Fort Halifax*, 482 U.S. at 12, 107 S.Ct. 2218. The LIJ Program, had it not been revoked prior to Schonholz's termination, indisputably would have required its administrator to do more than cut a single severance check. As in *Bogue*, even though the potential number of participants was small, and its activation uncertain[1], the Program's administration would

[1] The Program was only available to members of the President's Council who would be involuntarily terminated. LIJ makes much of the fact that no financial projections had been made prior to the Program's promulgation, nor were any administrative procedures put in place following the distribution of the May 3, 1991 memorandum. Once established, however, ERISA protects an employee's interest in a welfare benefit plan regardless of whether the employer complies with the administrative and reporting

(Footnote continued)

have required "a case-by-case, discretionary application of its terms." *Bogue*, 976 F.2d at 1323. The Court finds that the LIJ Program was an employee welfare benefit plan within the meaning of ERISA. Accordingly, the Court has jurisdiction over this action.

II. Schonholz's ERISA Claims

This Court denied LIJ's prior Rule 12(b)(6) motion to dismiss on this court solely because LIJ had failed to allege that LIJ had revoked the Program in writing. *Schonholz v. Long Island Jewish Medical Ctr.*, 858 F. Supp. 350, 353 (E.D.N.Y. 1993). LIJ now has established that its revocation of the Program was in writing and Schonholz admits that she had both oral and written notification of the LIJ Board's revocation of the Program prior to the effective date of her termination. As stated in this Court's prior opinion, severance plans are not vested under ERISA. *Id.* Thus, the Board's revocation was effective and Schonholz may not recover pursuant to this theory.

a. Breach of Fiduciary Duties under ERISA

As a second theory, Schonholz argues that she is entitled to recover because the LIJ Board revoked the Program in bad faith and in violation of its fiduciary duty to Schonholz as a beneficiary of the Program. She contends that she is entitled to recover severance benefits because the discontinuation of the Program was not a business decision but was punitive and directed against her individually. Schonholz cites a single case, *Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188 (E.D. Mo. 1980), *aff'd in part, rev'd in part*, 653 F.2d 1208 (8th Cir. 1981), for the proposition that an employee may recover benefits where an employer modifies or terminates its benefit plan in light of an impending personnel action, thus depriving an employee of benefits to which she

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requirements detailed under ERISA. *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S. Ct. 183 (1985).

otherwise would be entitled. In *Dependahl*, the court held that an employer violated his fiduciary duty to his employees when he eliminated a severance plan in contemplation of a mass firing.

Dependahl stands against the weight of authority. An employer unilaterally may amend or eliminate a severance plan at any time without violating ERISA requirements. *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.), *cart. denied*, 488 U.S. 981, 109 S.Ct. 529 (1988). Moreover, it may do so without consideration of its employees' interests. "Virtually every circuit has rejected the proposition that ERISA's fiduciary duties attach to an employer's decision whether or not to amend an employee benefit plan." *Hozier v. Midwest Fasteners. Inc.*, 908 F.2d 1155, 1161 (3d Cir. 1990). Additionally, the Supreme Court has held that an action for breach of fiduciary duties imposed on plan administrators may be brought only on behalf of a plan itself and not, as Schonholz has here, for the benefit of an individual beneficiary. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085 (1985); *Schonholz*, 858 F. Supp. at 354.

III. Schonholz's Common Law Claims

Section 514(a) of ERISA explicitly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144 (1985). This preemption provision has been broadly construed and generally precludes common law actions which "relate to" employee pension and benefit programs. *See, e.g., Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992) (ERISA preempts employee's breach of contract and promissory estoppel claims regarding oral promise of increased pension benefits); *Reichelt v. Emhart Corp.*, 921 F.2d 425, 431 (2d cir. 1990), *cert. denied*, 501 U.S. 1231, 111 S. Ct. 2854 (1991) ("ERISA preempts civil actions against employers for severance pay predicated on common law contract principles").

a. Contractual Vesting

LIJ objects to the consideration of Schonholz's contract claim as this theory of relief was not articulated in plaintiff's amended complaint nor at any time prior to this motion. Without providing specifics, LIJ urges that Schonholz should not be allowed to pursue her contract argument as it would prejudice LIJ. Pleading in federal court, however, only requires a "short plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8, and it is not required for the plaintiff to identify a legal theory under which relief is sought. *Brock v. Superior Care. Inc.*, 840 F.2d 1054 (2d Cir. 1988); *Siegelman v. Cunard White Star*, 221 F.2d 189, 196 (2d Cir. 1955). Further, the Court can see no prejudice to LIJ since, as LIJ itself notes, Schonholz's contract theory is merely a variant of her second cause of action for promissory estoppel. Therefore, Schonholz's contract claim has been adequately pleaded and is properly before the court.

Schonholz argues that the circumstances of her case fall within a line of cases which recognizes that, under ERISA, an employer contractually may waive its statutory right to modify or terminate benefits. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988); *see also Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 196 (1993); *Aldav v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S. Ct. 675 (1991). Schonholz contends that Dr. Match's letter was such a waiver and that, as a result, her severance benefits vested at the time she tendered her resignation in December 1992.

However, Congress has mandated that, although an employer may establish by contract that certain benefits are vested, it may only do so in formal plan documents. Informal communications between an employer and its employees cannot modify the terms of an ERISA plan. 29 U.S.C. § 1102(b)(3). *See also Moore*, 856 F.2d at 492 ("an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan

beneficiaries"). Clearly, Dr. Match's letter is not a formal plan document.

Further, even if the Court were to consider Dr. Match's letter to be a plan document, the letter does not explicitly waive LIJ's right to terminate benefits[2]. In order to override the statutory scheme which allows the employer an unqualified right to amend or terminate employee welfare benefits, any extra-ERISA commitment must be in "precise language denying the right to withdraw benefits." *Wise*, 986 F.2d at 938. Such is not the case here. Schonholz's claim amounts to an alternative theory of recovery under state common law and is, therefore, preempted by ERISA.

b. Promissory Estoppel

Alternatively, Schonholz argues that LIJ should be estopped from denying her severance pay benefits because she reasonably believed and detrimentally relied on Dr. Match's representation regarding severance pay.

The Court of Appeals for the Second Circuit has recognized estoppel as a cause of action under ERISA in "extraordinary circumstances." *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993) (citing, *inter alia*, *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1039 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012, 106 S. Ct. 1189 (1986)). Promissory estoppel requires (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained by the party asserting the estoppel by reason of her reliance. *See Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989); *Aquilio v. Police Benev. Assn. of N.Y. State Troopers*, 857 F. Supp. 190, 199 (N.D.N.Y. 1994).

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[2] The December 18, 1992 letter stated that "the terms of [Schonholz's] severance will be governed by the LIJ Medical Center personnel policies applicable to members of the President's Counsel, including the Severance Pay Program, dated May 3, 1991."

While Schonholz is able to show an unambiguous promise and reasonable, foreseeable reliance, she cannot demonstrate injury. Plaintiff argues that, in complying with Dr. Match's request to resign, she did not: (1) challenge her termination, (2) negotiate a more advantageous effective date for her termination, or (3) negotiate for more attractive payment and benefit terms. Schonholz was an employee at-will and, as such, had little or no leverage to challenge her termination or negotiate its terms. Moreover, although Schonholz contends in her brief that she was injured by submitting her resignation and agreeing to stay with LIJ for an additional three months, in her deposition she acknowledged that this practice was for the benefit of terminated employees to help them to secure employment elsewhere. She further contends that, had she not relied on Dr. Match's assurance of benefits under the LIJ Program, she would have negotiated a severance package as others had before her. LIJ states that they had been willing to negotiate an individual severance package with Schonholz after the Program was terminated but she chose to pursue this action instead. Even if one does not credit LIJ's statement, its past practice of paying severance to terminated employees did not bind LIJ to pay Schonholz severance. Schonholz's expectation of benefits under the LIJ Program and disappointment at its termination are not sufficient to constitute detrimental reliance.

CONCLUSION

There being no question of material fact, LIJ's motion for summary judgment for lack of subject matter jurisdiction is DENIED. Its motion for summary judgment for failure to state a claim is GRANTED and this action is DISMISSED in its entirety. Schonholz's cross-motion is DENIED.

SO ORDERED.

Dated: Brooklyn, New York
February 3, 1995

/s/ J.R. Bartels

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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GLENISS S. SCHONHOLZ,

Plaintiff,

- against -

LONG ISLAND JEWISH MEDICAL CENTER, IRVING SCHNEIDER, ELIHU MODLIN, LEONARD NADEL, STANLEY GREY, MICHAEL FELDMAN and IRVING WHARTON, JOHN and JANE DOES 1-15,

Defendant.
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MEMORANDUM AND ORDER

93 CV 2549 (JRB)

Bartels, U.S. District Judge.

Plaintiff brings this action pursuant to the Employee Retirement Income Security Act ["ERISA"], 29 U.S.C. § 1132(a)(1)(B), to recover benefits owed under her former employer's severance benefit plan. Defendants have moved to dismiss under Federal Rule of Civil Procedure ["Rule"] 12(b)(6) for failure to state a claim upon which relief may be granted. In addition, plaintiff and defendants have each cross-moved for Rule 11 sanctions. For reasons more fully explained herein, defendants' motion to dismiss is granted in part and denied in part, and the cross-motions for sanctions are denied.

FACTS

Plaintiff Gleniss Schonholz was employed by Long Island Jewish Medical Center ["LIJ"] as Chief Operating Officer. On May 3, 1991 LIJ implemented a severance pay program for senior management personnel who would be involuntarily terminated or removed from their positions. By letter dated December 18, 1992, LIJ's President and Chief Executive

Officer, Dr. Robert K. Match, requested that plaintiff submit her resignation effective April 1, 1993. Dr. Match indicated in his letter that the request for plaintiff's resignation was due to a change in hospital management, and was in no way related to her job performance. Further, Dr. Match's letter explicitly stated that plaintiff would be eligible for benefits under the May 3, 1991 severance pay program.

On December 22, 1992, plaintiff submitted her resignation effective April 1, 1993. It is undisputed that LIJ has not paid plaintiff severance benefits under the May 3, 1991 program. Plaintiff claims that ERISA guarantees her the right to payment under the severance pay program, and that defendants are estopped from denying her benefits based on Dr. Match's representations. However, defendants argue that ERISA permitted them to amend or terminate the severance program, and that plaintiff has not properly stated a claim of estoppel.

DISCUSSION

I. STANDARD OF REVIEW

The court may grant a motion to dismiss pursuant to Rule 12(b)(6) only where it is beyond doubt that the plaintiff cannot prove any set of facts supporting entitlement to relief. *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 249-50 (1989); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In deciding the motion, the court must accept as true the material facts alleged in the complaint, *LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991), and must construe all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 236 (1974).

In addition, the court is not permitted to consider factual matters submitted outside of the complaint unless the parties are given notice that the motion to dismiss is being converted to a motion for summary judgment under Rule 56 and are afforded an opportunity to submit additional affidavits. *See Festa v. Local 3 International Brotherhood of Electrical Workers*, 905 F.2d 35, 38 (2d Cir. 1990) ("this provision . . . is mandatory with respect to motions pursuant to

Rule 12(b)(6)"); *Wiener v. Napoli*, 760 F. Supp. 278, 282 (E.D.N.Y. 1991). In this case, plaintiff has submitted her own affidavit, sworn to September 2, 1993, in opposition to the motion to dismiss, and the affidavit of Dr. Robert K. Match, sworn to October 22, 1993, in sur-reply to the motion to dismiss. Similarly, defendants have made factual representations in their memoranda of law in an effort to refute the allegations of the complaint. However, since the parties have not had an opportunity to submit all of the pertinent material for a summary judgment motion[1], the court will not consider these affidavits and additional factual material in assessing the sufficiency of the complaint.

II. COUNT ONE - ERISA

It is well settled that severance pay policies are employee welfare plans governed by ERISA. *See Bradwell v. GAF Corp.*, 954 F.2d 798, 800 n.1 (2d Cir. 1992); *Garrett v. Veterans Memorial Medical Center*, 821 F. Supp. 838, 840 (D. Conn. 1993). Further, under ERISA, severance benefits are not vested; an employer has the right to amend or eliminate a severance pay plan at any time. *See Landy Michaels Realty Corp. v. Local 32B-32J, Service Employees International Union*, 954 F.2d 794, 801 (2d Cir. 1992); *Reichelt v. Emhart Corp.*, 921 F.2d 425, 430 (2d Cir. 1990) (citing cases), *cert. denied*, 111 S.Ct. 2854 (1991). Accordingly, plaintiff may only recover benefits under ERISA § 1132(a)(1)(B) pursuant to the May 3, 1991 severance pay program if this plan was in effect at the time her employment with LIJ terminated.

According to the complaint, plaintiff was employed by LIJ until April 1, 1993. *See* ¶ 9. Although plaintiff argues that she was "terminated" by LIJ in December 1992 when Dr. Match requested her resignation, the severance pay program clearly contemplates the payment of benefits only after the cessation of regular employment. Plaintiff further alleges that

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[1] Moreover, the court declines to convert this motion to dismiss to a Rule 56 motion because significant factual discovery which would make this case ripe for a summary judgment motion has yet to be completed.

defendants revoked the severance pay program "after the termination of the plaintiff's employment". *See* ¶ 15. In this reply memorandum of law in support of the motion to dismiss, defendants claim that the May 3, 1991 severance pay program was revoked at a meeting of LIJ's Board of Trustees held on March 23, 1993, *prior* to the termination of plaintiff's employment. However, the court is not permitted to consider factual matters outside of the complaint in deciding a motion to dismiss. Plaintiff alleges that she has not been paid benefits according to the severance pay program in effect at the time her employment terminated; these allegations are sufficient to state a claim under ERISA and therefore to withstand a motion to dismiss.

Moreover, ERISA requires every employee benefit plan to be established and maintained pursuant to a written instrument. 29 U.S.C. § 1102. An employee benefit plan cannot be unilaterally amended or superseded by an employer by oral modification. *See Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163-64 (3d Cir. 1990) (citing cases); *Adler v. Aztech Chas P. Young Co.*, 807 F. Supp. 1068, 1071 (S.D.N.Y. 1992). *See also Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988). There is no allegation in the complaint that defendants revoked the severance pay program in writing. Therefore, defendants' alleged revocation of the May 3, 1991 severance pay program would not have been effective to deprive plaintiff of her benefits if the revocation was not reduced to writing prior to the termination of plaintiff's employment.

For all of the foregoing reasons, defendants' motion to dismiss plaintiff's first cause of action under ERISA is denied.

III. COUNT TWO - PROMISSORY ESTOPPEL

Plaintiff's second cause of action alleges that defendants are estopped from denying her severance benefits because Dr. Match's letter seeking plaintiff's resignation explicitly stated that she would receive benefits under the May 3, 1991

severance pay program. The Second Circuit has held that estoppel principles can apply in ERISA under "extraordinary circumstances". *See Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993). In order to state a claim for promissory estoppel, plaintiff must allege: (1) a material misrepresentation, (2) reliance, and (3) damages. *Id.*

The complaint in this case alleges damage to plaintiff in the amount of the benefits she would have received under the severance pay program. The complaint also alleges a material misrepresentation by Dr. Match on behalf of LIJ. Defendants argue that Dr. Match's letter promised plaintiff no more than the benefits provided under LIJ's severance policy in effect on the date her employment terminated. The court disagrees. Dr. Match's letter states, in relevant part:

> "the terms of [plaintiff's] severance will be governed by the LIJ Medical Center personnel policies applicable to members of the President's Council, *including the Severance Pay Program dated May 3, 1991.* At your option, the initial twelve months of severance pay may be taken in one lump-sum payment on the day of your termination or bi-weekly over the twelve months after your termination."

Dr. Match's letter is unambiguous in referring to the May 3, 1991 severance pay program. In addition, the letter goes on to explicitly describe the benefits plaintiff would receive under that program. Therefore, the court finds that Dr. Match's letter constitutes an alleged material misrepresentation for purposes of a motion to dismiss. Accordingly, plaintiff has sufficiently plead the first and third elements of her estoppel claim.

However, the complaint fails to allege the second element of estoppel, actual reliance. Plaintiff does not allege that she resigned relying on the fact that she would receive severance benefits; she states instead that she resigned upon the request of LIJ in connection with a change in hospital administration. Nor does the complaint describe any other actions taken by plaintiff in reliance on Dr. Match's statements. Accordingly, defendants' motion to dismiss plaintiff's second cause of

action is granted without prejudice, and plaintiff is granted leave to amend the complaint and replead her estoppel claim.

IV. CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

Plaintiff brings suit against defendants Irving Schneider, Leonard Nadel, Stanley Grey, Michael Feldman and Irving Wharton, members of LIJ's Board of Trustee's Compensation Committee, and defendant Elihu Modlin, a member of the Board's Legal Committee, alleging that they breached fiduciary duties as administrators of LIJ's severance plan. However, the complaint fails to allege specific facts which, if proven, would constitute a breach of fiduciary duty on the part of any of the defendants. Plaintiff's general allegations that these defendants "were responsible for the decision not to pay any severance benefits to plaintiff and for the attempt to revoke LIJ's severance benefit plan retroactively" are insufficient to state a cause of action against any individual defendant.

Moreover, the Supreme Court has held that thee fiduciary duties imposed by ERISA on plan administrators run only to the plan itself, not individual beneficiaries. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 144 (1985). *See also Lee v. Burkhart*, 991 F.2d at 1009; *Donnelly v. Bank of New York Company, Inc.*, 801 F. Supp. 1247, 1253-54 (S.D.N.Y. 1992). Plaintiff argues that the individual defendants are proper parties to this action, citing *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990). Although *Hozier* holds that plan administrators owe a fiduciary duty to plan participants, the Third Circuit specifically recognized that any liability accrues to the benefit of the plan only, not participants seeking to recover damages in their individual capacities. 908 F.2d at 1162 n. 7.

Accordingly, defendants' motion to dismiss the complaint against the individual defendants is granted, with prejudice. Plaintiff will not be granted leave to file an amended complaint against the individual defendants as such filing would be futile. *See, e.g., Kaster v. Modification Systems, Inc.*, 731 F.2d 1014, 1018 (2d Cir. 1984); *Jenkins v. Sea-Land Service,*

Inc., 1993 U.S.Dist. LEXIS 11580 at *15 (S.D.N.Y. August 19, 1993).

V. CLAIM FOR PUNITIVE DAMAGES

In *Massachusetts Mutual Life Insurance Co. v. Russell*, the Supreme Court held that extra-contractual compensatory or punitive damages are not available in an action for breach of fiduciary duty under § 409 of ERISA, 29 U.S.C. § 1109. 473 U.S. at 147-48. Although the Supreme Court declines to determine the availability of punitive damages under other sections of ERISA and the Second Circuit has not yet addressed the issue, virtually every court to face the question has decided that punitive damages are not available under ERISA. *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 (11th Cir. 1991); *Reinking v. Philadelphia American Life Insurance Co.*, 910 F.2d 1210, 1219-20 (4th Cir. 1990); *Pane v. RCA Corporation*, 868 F.2d 631, 635 n.2 (3d Cir. 1989); *Drinkwater v. Metropolitan Life Insurance Co.*, 846 F.2d 821, 825 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988); *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 888 n.2 (10th Cir. 1988); *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987); *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986) (damages for emotional distress); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1464-65 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Swanson v. U.A. Local 13 Pension Plan*, 779 F. Supp. 690, 700 n.4 (W.D.N.Y.), *aff'd*, 953 F.2d 636 (2d Cir. 1991); *Lawford v. New York Life Insurance Co.*, 739 F. Supp. 906, 914 (S.D.N.Y. 1990); *Giuntoli v. Garvin Guybutler Corp.*, 726 F. Supp. 494, 509-10 (S.D.N.Y. 1989). *But see Reeves v. Continental Equities Corporation of America*, 767 F. Supp. 469, 474 (S.D.N.Y. 1991) (declining to strike plaintiff's claim for punitive damages on a motion to dismiss).

In light of the overwhelming weight of authority supporting defendants' position that punitive damages are not available to plaintiff, the motion to dismiss the punitive damages claims is granted with prejudice.

VI. RULE 11

The Federal Rules place an affirmative obligation on parties and their counsel to make an objectively reasonable inquiry into the facts and the law and not to conduct a lawsuit for an improper purpose. *See* Rule 11; *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1470 (2d Cir. 1988), *rev'd on other grounds sub nom Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). The "key to Rule 11 lies in the certification flowing from the signature to a pleading, motion, or other paper in a lawsuit." *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). *See also Coltrade International, Inc. v. United States*, 973 F.2d 128, 131 (2d Cir. 1992). Accordingly, sanctions may not be imposed based on broad findings of bad faith or frivolous litigation; rather, the court must identify particular papers certified to a federal court by specific individuals. *Id.*; *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 22 (2d Cir. 1990).

When Rule 11 is violated, the court must impose sanctions. *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987); *Mars v. Anderman*, 136 F.R.D. 351, 353 (E.D.N.Y. 1989). However, the court should resolve all doubts in favor of the signer and avoid using hindsight. *Oliveri v. Thompson*, 803 F.2d at 1275. The standard under Rule 11 is an objective test, based on what a reasonably competent attorney would believe under the circumstances, consistent with minimal standards of professional competence. *Greenberg v. Hilton International, Inc.*, 870 F.2d 926, 934 (2d Cir. 1989); *Krauss v. Bowen*, 738 F. Supp. 648, 653 (E.D.N.Y. 1990).

Defendants argue that plaintiff violated Rule 11 by submitting a sur-reply in opposition to the motion to dismiss, and by asserting factual matters beyond the scope of the complaint. The filing of a sur-reply, while not explicitly authorized by the Federal or Local Rules, does not in itself constitute a failure to inquire into the facts or law. In addition, defendants are

equally guilty of injecting into the motion to dismiss factual matters outside of the complaint allegations.

On the other side, plaintiff claims defendants are liable for sanctions based on counsel's frivolous and unsworn allegations of fraud and misuse of Rule 11. The court is inclined to agree that defendants' allegations regarding a concealed scheme by Dr. Match to raid the hospital's strained coffers for the benefit of his intimate friends appear to be lacking in factual support. However, although these statements come dangerously close to a Rule 11 violation, the court has resolved all doubts in favor of defendants and declines to impose sanctions at this time.

CONCLUSION

For all of the foregoing reasons, defendants' motion to dismiss is GRANTED in part and DENIED in part. The motion to dismiss plaintiff's first cause of action under ERISA is DENIED. The motion to dismiss plaintiff's second cause of action based on estoppel is GRANTED, with leave to amend. The motion to dismiss plaintiff's claims against the individual defendants and for punitive damages is GRANTED with prejudice. The cross-motions for Rule 11 sanctions are DENIED.

SO ORDERED.

Dated: Brooklyn, New York
February 18, 1994

/s/ John R. Bartels
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

MANDATE

BKNY
93-CV-2549
BARTELS

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of June, one thousand nine hundred and ninety-six.

PRESENT: HON. Thomas J. Meskill
HON. J. Daniel Mahoney
HON. John M. Walker, Jr.

Circuit Judges

UNITED STATES
COURT OF APPEALS
FILED
JUN 26 1996
GEORGE LANGE III,
CLERK
SECOND CIRCUIT

Docket No: 95-7289

GLENISS S. SCHONHOLZ,

Plaintiff-Appellant,

-v-

LONG ISLAND JEWISH MEDICAL CENTER,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED and DECREED** that the judgment of said district court be and it hereby is affirmed in part, vacated in part, and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By:

/s/ Arthur M. Heller

Arthur M. Heller
Administrative Attorney

A TRUE COPY
GEORGE LANGE III, CLERK

/s/ George Lange III

ISSUED AS MANDATE: JUL 11 1996

LONG ISLAND JEWISH MEDICAL CENTER

MEMORANDUM

To:	Members of President's Council	Date:	May 3, 1991
From:	Robert K. Match, MD President	Subject:	Severance Pay Program

Confidential

In order to deal effectively with the ever changing and challenging health care environment of the 1990s and beyond, it is essential that LIJ be able to recruit and retain the services of high level senior management personnel.

In light of the fact that we do not provide Employment Contracts but wish to encourage continued professional career development at LIJ, I have decided to implement for all members of the President's Council a severance pay program. Under the terms of this program, any member of the President's Council who is involuntarily terminated or removed from his position, for other than illegal conduct or for substantially deficient performance which is detrimental to LIJ, shall be entitled to receive his regular weekly salary, in effect as of the day before his termination for the specified period of time outlined below:

Years of Employment at LIJ	Severance Payment
0 - 2 years	None;
More than 2 years and up to 5 years	6 months plus up to an additional 3 months in the event the individual has not found employment;
More than 5 years and up to 10 years	1 year plus up to an additional 3 months in the event the individual has not found employment;

10 years and beyond	1 year plus up to an additional 6 months in the event the individual has not found employment.

The initial severance pay entitlement of six months or one year, depending upon years of service at the time of termination, shall be paid on a biweekly basis and for the full term regardless of whether the individual seeks or obtains other employment during this period.

RECEIVED
OFFICE OF THE
ADMINISTRATOR

HILLTOP HOSPITAL
LONG ISLAND JEWISH
MEDICAL CENTER

Should he still be seeking employment commensurate with his former organizational level and scope of responsibility, after the initial severance pay entitlement period has expired, he shall then continue to receive a regular weekly salary, provided he is eligible by length of service, until such employment is obtained or the additional months have expired, whichever occurs sooner. Such continuation is dependent upon the individual making a reasonable and good faith effort to obtain such employment.

In addition to these severance payments, he will also receive at the time of termination all of his accrued but unused vacation, holiday and personal time as per the then existing Medical Center policy. LIJ will also continue to pay for health, life, and disability insurance benefits, and retirement plan benefits, as they existed on the day before termination, until the individual obtains another job or upon the completion of his entire severance program entitlement period, whichever occurs first. An Outplacement Service of his choice will be made available at Medical Center expense.

I trust that this program will help engender a sense of stability among our senior management staff. In addition, this program should help to demonstrate LIJ's appreciation of your dedicated service.

/s/ RK Match, MD

RKM:sx

Distribution:
Seymour Cohen, MD
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Christine Pappas, RN, MA
Gleniss S. Schonholz

December 2, 1992

Mr. Mike Caver
Heidrick & Struggles
125 South Macker Drive
Chicago, IL 60606-4590

Dear Mr. Caver:

As a follow up to our telephone conversation, I am enclosing my resume.

The imminent retirement of our Medical Center's C.E.O. plus the likelihood of a lengthy and undefined transition period are factors in my decision to consider leaving the Hospital. In addition, a search committee has not yet been formed.

It might be helpful if you had an idea of the type of position that would be of interest to me. I am not wedded to remaining in a hospital environment. An opportunity for a senior management position outside the health care field would be of interest.

For example, as a patron of both the Metropolitan Museum of Art and the Metropolitan Opera, I have become familiar with their organizations and have observed that there are many similarities in regard to operational issues, e.g. emphasis on program development, market share, obtaining political support and funding. In fact, the CFO of the Metropolitan Museum was previously employed at the Health and Hospitals Corporation.

Relocation would not be an option for me at this time, however, one hour's travel to from Manhattan would be acceptable.

Since I have not publicized my intention to leave the Medical Center it is important that confidentiality be maintained. Please contact me if you require any additional information at this time.

Sincerely

Enclosure

December 18, 1992

Mrs. Gleniss S. Schonholz
Senior Vice President/C.O.O.
Long Island Jewish Medical Center
New Hyde Park, NY 11042

Dear Gleniss:

As a result of the announcement of my retirement in 1993, I anticipate there will be changes in senior management of the LIJ Medical Center. This letter will confirm my request that you submit your resignation effective April 1, 1993. I have recently had discussions with the Chairman of the Board of Trustees and other Board members and they concur with this request.

I want to assure you that this decision is in no way related to your performance as Senior Vice-President. I believe it is necessary in order to provide my successor maximum flexibility in selecting his principal deputy.

Of course, the terms of your severance will be governed by the LIJ Medical Center personnel policies applicable to members of the President's Council, including the Severance Pay Program dated May 3, 1991. At your option, the initial twelve months of severance pay may be taken in one lump-sum payment on the day of your termination of bi-weekly over the twelve months after your termination.

Please arrange to meet with the Vice-Presidents of Finance and Human Resources to discuss and arrange the details.

I know you intend to seek other employment; if I can be of any assistance to you in your search for future employment please do not hesitate to call upon me.

Thank you for all your efforts and years of dedicated service.

Sincerely,

Robert K. Match, MD

President

December 22, 1992

Robert K. Match, MD
President
Long Island Jewish Medical Center
New Hyde Park, NY 11042

Dear Bob,

In accordance with your request, I am submitting my resignation effective April 1, 1993.

The twelve years I have worked at LIJ under your leadership have been professionally rewarding.

Sincerely,

Gleniss S. Schonholz

No. 96-485

Supreme Court, U.S.
FILED
OCT 25 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LONG ISLAND JEWISH MEDICAL CENTER,

Petitioner,

—v.—

GLENISS S. SCHONHOLZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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October 25, 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-485

LONG ISLAND JEWISH MEDICAL CENTER,

Petitioner,

—v.—

GLENISS S. SCHONHOLZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari submitted by petitioner Long Island Jewish Medical Center.

STATEMENT OF THE CASE

Except to highlight the few points below, respondent Gleniss Schonholz incorporates by reference the statement of facts in the Second Circuit's opinion (A-2-4):[1]

[1] Schonholz adopts the abbreviations used in petitioner's brief ("Petition") unless otherwise noted.

The terms of LIJ's May 3, 1991 severance pay program (the "Severance Plan" or the "Plan"), including the eligibility requirements and other criteria, are succinctly described in the opinion below:

> Payments under the Severance Plan were to be based upon both the length of time the employee held his position and his prospects for reemployment, but they would be made only if the employee displayed a reasonable and good faith effort to obtain a position commensurate with his former level of responsibility. In addition, the employee would not be eligible for payments under the Severance Plan if the termination was for either illegal conduct or substantially deficient performance. The Severance Plan provided that the terminated employee would continue to receive other benefits, and contained no provision for its termination or amendment.

A-2; *see* A-35-37. The Plan thus required LIJ to make a discretionary, case-by-case analysis of (1) the circumstances of each employee's termination, (2) whether the employee was making reasonable efforts to obtain new employment and (3) whether such new employment was commensurate with the position the employee had occupied at LIJ (defined in terms of "former organizational level and scope of responsibility"). *See* A-7-8; A-36.

The Plan was created and maintained without ERISA's reporting and disclosure formalities: no formal plan documents were filed with the Secretary of Labor and no summary plan descriptions were distributed to the covered employees. *See* A-10-11. Moreover, as the Second Circuit noted, the employees covered by the Severance Plan reasonably perceived that LIJ had made an ongoing commitment to provide employment benefits (A-7-8), particularly given that "LIJ neither created nor circulated any documents purporting to

amend [or] modify" the Plan before it was terminated in March 1993. A-2.

Schonholz was a long-time employee of LIJ and its Senior Vice President and Chief Operating Officer from 1987 until her termination on April 1, 1993. Schonholz's termination was not for cause, but rather was precipitated by continuing disagreements and friction with LIJ's new Chairman. A-3. In December 1992, LIJ's then-President, Dr. Robert Match, informed Schonholz that he was going to ask for her resignation, which he formalized in a letter to her, dated December 18, 1992. *Id.*; A-39. The letter stated that "the terms of your severance will be governed by the LIJ Medical Center personnel policies applicable to members of the President's Council, including the Severance Pay Program dated May 3, 1991." A-39; A-3. In light of this promise, Schonholz opted neither to contest her termination nor to seek to negotiate an individual severance package pursuant to LIJ's long-standing policy and practice. R. 1152; Petition at 4. Rather, in acceptance of the terms offered in Dr. Match's letter, Schonholz submitted her resignation in a letter dated December 22, 1992 (A-40), and agreed to LIJ's request that she remain at her position until April 1, 1993. A-39. Nine days before the effective date of Schonholz's termination, on March 23, 1993, LIJ's Board of Trustees resolved to revoke the Severance Plan and, accordingly, to deny Schonholz the severance benefits to which she was entitled under the terms of both the May 3, 1991 Plan and Dr. Match's December 18, 1992 letter requesting her resignation.

In addition to the facts highlighted above, Schonholz corrects the following factual inaccuracies in LIJ's brief:

First, LIJ states that its President merely "*purported* to establish" the Severance Plan for Schonholz and the seven other senior-level employees (Petition at 4) (emphasis added), suggesting that the Plan was unauthorized because it "was not submitted to LIJ's Board of Trustees for review, much less

approval." *Id.* at 3. In fact, Dr. Match, LIJ's President and Chief Executive Officer, indisputably had the authority to promulgate the Severance Plan, as expressly set forth in LIJ's corporate bylaws, which confer upon the CEO the responsibility of "developing and maintaining personnel policies and practices." R. 98.[2] The record is also clear that Dr. Match, himself a Board member, sought and obtained approval from then-Chairman of the Board William Mack before implementing the Plan. R. 452, 508, 633-34, 1458-62, 1464.

Second, LIJ incorrectly maintains that the decision below "dramatically alters" this Court's precedent by requiring that, whenever an employer makes a discretionary offer of severance benefits, "the employer must comply with *all* of ERISA's substantive and *procedural* requirements—regardless of whether any plan or administrative program is implicated." Petition at 11 (emphasis added). Both the district court and the Second Circuit held that ERISA protects an employee's interest in a welfare benefit plan *regardless* of whether the employer complies with all the procedural (*i.e.*, administrative and reporting) requirements of ERISA. A-18-19 n.1; *see* A-4-8. Indeed, in its brief to the Second Circuit, LIJ asserted (and Schonholz did not contest) that, pursuant to Department of Labor regulations, LIJ's Severance Plan was exempt from

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[2] Elsewhere, LIJ admits as much by acknowledging that the "decision whether to grant a senior manager any benefits upon involuntary termination, and in what amount, rested, ultimately, with Dr. Match." Petition at 4. Indeed, Dr. Match routinely authorized and implemented employee benefit programs that were more extensive and expensive than the Severance Plan without Board approval or involvement. R. 390-98, 1343-44, 1351-52, 1358-64.

LIJ is also incorrect to label the Severance Plan a "golden parachute" (Petition at 3, 16), with the attendant inference that the Plan was excessively generous. The record reflects that the Severance Plan was a conservative, reasonable and customary severance policy that was, if anything, less generous than the policies which were prevalent in the health care industry, both when it was established and when Schonholz made her claim under the Plan. R. 191, 193, 450-51, 1294, 1297, 1320-22, 1458-59.

ERISA's reporting and disclosure provisions. *See* A-11. Although LIJ now misstates the holding below as mandating that all employee welfare benefit plans must comply with all of ERISA's procedural requirements, the Second Circuit expressly stated that this Court has "clarified that such adherence to formalities is not mandated by the statute." *Id.*

REASONS FOR DENYING THE WRIT

This Court should deny the writ sought by petitioner because there is no conflict between the decision of the court below and those of this Court regarding the standard for ERISA pre-emption, and there is no circuit split on the availability of promissory estoppel under ERISA. The Second Circuit's determination that LIJ's Severance Plan was covered by ERISA is completely consistent with this Court's holding in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). The few circuit courts that have declined to apply promissory estoppel as a basis for recovering ERISA plan benefits did so in cases in which the *facts* did not support an estoppel theory. Moreover, the case at hand affects the rights of just one participant in a benefit plan that has since been revoked; no other beneficiaries' rights are implicated. Accordingly, there is no reason for this Court to review the decision below.

I.

THE SECOND CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENT IN DETERMINING THAT LIJ'S SEVERANCE PLAN WAS GOVERNED BY ERISA.

The Second Circuit correctly held that the Severance Plan—a typical offer of severance benefits—was an employee welfare benefit plan governed by ERISA, finding that the Plan "necessitated both managerial discretion and a separate analysis of each employee in light of certain criteria." A-7-8.[3] LIJ challenges that ruling by misconstruing this Court's decision in *Fort Halifax*, which held that a state statute requiring a one-time, lump-sum payment to employees who were laid off due to plant closings was not pre-empted by ERISA. The test that emerged from *Fort Halifax* for ERISA pre-emption was whether the provision of employee benefits required an "ongoing administrative program." 482 U.S. at 11-12. LIJ contends that the Second Circuit in this case has joined other courts in failing to adhere to the *Fort Halifax* test by looking to a plan's need for managerial discretion. As the Second Circuit and other courts have correctly recognized, however, "managerial discretion" is not a standard different from "ongoing administrative program"; evidence of the former is merely one way to demonstrate the latter.

The Second Circuit's opinion states that "it is plain that ERISA subject matter jurisdiction depends on the need for an administrative program," and reasons that a "variety of factors, including whether the employer's undertaking or obli-

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[3] The Second Circuit's determination that this fairly common type of severance policy was an ERISA plan is entirely consistent with this Court's opinion in *Massachusetts v. Morash*, 490 U.S. 107 (1989), which observed that "plans to pay employees severance benefits, which are payable *only* upon termination of employment, are employee welfare benefit plans within the meaning of [ERISA]." *Id.* at 116 (emphasis in the original).

gation requires managerial discretion in its administration," aids in the "determination of which obligations are complex enough to require such a program." A-7 (citing *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993)). After discussing other factors courts have considered in making the determination,[4] the Second Circuit remarked, "We need not decide today which one or more of these factors will be determinative in every case because, in this case, we conclude that *all* of them favor Schonholz." A-7 (emphasis added).

In arriving at its conclusion that ERISA governs the Severance Plan, the Second Circuit expressly distinguished its decision in *James v. Fleet/Norstar Financial Group, Inc.*, 992 F.2d 463 (2d Cir. 1993), which involved an obligation similar to the one analyzed in *Fort Halifax*. In *James*, the court found that an employer's promise to provide its employees 60-days' additional pay in the event of a plant closing did not require an ongoing administrative program and thus was not

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[4] In addition to *Bogue*, which assessed a plan's need for administration by whether it required "a case-by-case discretionary application of its terms," 976 F.2d at 1323, the court cited *Belanger v. Wyman-Gordon Co.*, 71 F.3d 451 (1st Cir. 1995), and *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992). *See* A-7. In *Belanger*, the First Circuit looked to whether a "reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits." 71 F.3d at 455. In *Fontenot*, the Fifth Circuit considered whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria. 953 F.2d at 963 (citing *Pane v. RCA Corp.*, 667 F. Supp. 168, 171 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989)).

Although LIJ argues that the district court in *Pane* and the Ninth Circuit in *Bogue* incorrectly applied *Fort Halifax* (Petition at 15), both courts expressly adhered to the ongoing administrative program standard and factually distinguished *Fort Halifax* in finding ERISA pre-empted the plans at issue. *Pane*, 667 F. Supp. at 170-71; *Bogue*, 976 F.2d at 1323. Indeed, LIJ seeks to create a circuit conflict merely by focusing on the *results* of the consistent *Fort Halifax* analyses conducted by the several circuits.

pre-empted by ERISA. A-6. By contrast, various managerial assessments and decisions inherent in the terms of the Severance Plan "required much more than the simple arithmetic calculations we held to be insufficient in *James*." A-7. "Unlike the employer's obligation in *Fort Halifax* and the promise in *James*, the Severance Plan was not limited either to a single payment or to a short span of time upon a plant or office closing. The Severance Plan's effective period was unlimited and would have reasonably been perceived by an employee as an ongoing commitment." A-8.[5]

LIJ cannot support its assertion that the Second Circuit's decision places it at odds with the Fifth and Eighth Circuits, which have "consistently adhered to the *Fort Halifax* analysis." Petition at 14 (citing *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994), and *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992)). In *Kulinski*, the Eighth Circuit determined a benefit plan did not require an administrative program by assessing whether it implicated the exercise of managerial discretion and finding that "there was nothing for the company to decide" and "no discretion for it to exercise." 21 F.3d at 258. In *Fontenot*—cited with approval by the Second Circuit (*see* A-7; note 4, *supra*)—the Fifth Cir-

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[5] Thus, this case does not "place[ ] the Second Circuit in the intra-circuit conflict column," as LIJ asserts. Petition at 16. The Second Circuit factually distinguished the undertakings of the Severance Plan from the lesser obligation at issue in *James* in arriving at a different conclusion as to ERISA's applicability.

Moreover, although unsuccessful before the district court and the Second Circuit, LIJ continues to try to find significance in the fact that an administrative program was not yet in place when Schonholz made the first claim under the Severance Plan. *See* Petition at 5, 16. Plainly, *Fort Halifax* and its progeny look to the *need* for an administrative program, not to its implementation. *See Fort Halifax*, 482 U.S. at 11 ("[pre-emption] arises . . . with respect to benefits whose provision by nature requires an administrative program"); *see also, e.g., Delaye v. Agripac, Inc.*, 39 F.3d 235, 237 (9th Cir. 1994) (the test that has emerged from *Fort Halifax* is "does the benefit package implicate an ongoing administrative scheme?"), *cert. denied*, 115 S. Ct. 1402 (1995).

cuit looked to whether the circumstances of each employee's termination had to be analyzed in light of certain criteria in determining whether the plan at issue required an administrative scheme. 953 F.2d at 963.[6] These were two of the three factors the Second Circuit considered in finding that all of them supported the conclusion that the Severance Plan required an ongoing administrative program and thus was covered by ERISA. *See* A-7-8. The very cases on which LIJ relies thus demonstrate that there is no conflict among the circuits in interpreting the *Fort Halifax* standard for ERISA pre-emption.

II.

THERE IS NO CIRCUIT SPLIT REGARDING THE AVAILABILITY OF PROMISSORY ESTOPPEL UNDER ERISA IN APPROPRIATE CIRCUMSTANCES.

The Second Circuit's holding that Schonholz has a viable promissory estoppel claim is consistent with that circuit's precedent and does nothing to create or exacerbate a circuit split on this issue. As the Second Circuit had previously held, and reiterated in this case, "principles of estoppel can apply in ERISA cases under extraordinary circumstances." A-12

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[6] LIJ cites no authority for its suggestion that the Fifth and Eighth Circuits have declined to apply ERISA to plans in part because they covered only "a handful of 'beneficiaries.' " Petition at 14. In fact, "it is well established that the requirement of a class of beneficiaries may be satisfied even when there is only one employee participating in the plan." *Grimo v. Blue Cross and Blue Shield of Vermont*, 899 F. Supp. 196, 202 n.6 (D. Vt. 1995) (citing *Madonia v. Blue Cross and Blue Shield of Virginia*, 11 F. 3d 444, 447-49 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1401 (1994); *Williams v. Wright*, 927 F.2d 1540, 1545 (11th Cir. 1991)). *See* 29 C.F.R. §§ 2510.3-3(b) & 2510.3-3(c)(1) (Department of Labor regulations providing that plan must involve at least one employee other than corporation's sole owner to satisfy ERISA "participant" requirement).

(citing *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993)). Such circumstances can occur, as here, when an employer makes a written promise that is at the same level of formality as a plan creation document which lacks an amendment procedure, and an employee reasonably and detrimentally relies on that promise. *See* A-11, A-13-14. Estoppel claims under ERISA have been denied where the facts cannot support them; there is no circuit split on the availability of estoppel in appropriate circumstances.

This Court has sanctioned the development of federal common law to fill the interstitial gaps in ERISA's statutory scheme, *see, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), and, accordingly, the Second Circuit is among the many circuit courts to recognize estoppel claims under federal common law principles. *E.g., In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 58 F.3d 896, 907-08 (3d Cir. 1995); *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994); *Devoll v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1381 (1995); *Slice v. Sons of Norway*, 34 F.3d 630, 634 (8th Cir. 1994); *Law v. Ernst & Young*, 956 F.2d 364, 367-68 (1st Cir. 1992); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Kane v. Aetna Life Ins.*, 893 F.2d 1283 (11th Cir.), *cert. denied*, 498 U.S. 890 (1990).

The cases LIJ cites for the proposition that some circuits do not allow promissory estoppel claims under ERISA simply do not involve facts in which estoppel would be appropriately applied. *See Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992) (where ERISA plan at issue adhered to statutory formalities, the court declined to "enforce an informal written agreement under a theory of federal common law estoppel"), *cert. denied*, 507 U.S. 987 (1993); *Alday v. Container Corp. of America*, 906 F.2d 660, 666 (11th Cir. 1990) ("no federal common law right to promissory estoppel under ERISA in cases involving oral amendments to or modifications of employee plans") (citing *Nachwalter v. Christie*, 805

F.2d 956, 960 (11th Cir. 1986)), *cert. denied*, 498 U.S. 1026 (1991); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (promissory estoppel not cognizable to enforce "oral modifications to benefit plans"); *see also Devoll*, 35 F.3d at 412 (holding that, while ERISA pre-empts promissory estoppel under *state* common law, " 'federal equitable estoppel principles can, in certain circumstances, apply to some claims arising out of ERISA' ") (quoting *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821 (9th Cir. 1992)).

LIJ thus cannot support its suggestion that circuits recognizing estoppel-based claims under ERISA have misused their authority to create federal common law by "revis[ing] the statute." Petition at 20. As shown above, courts have consistently denied estoppel claims based on oral promises or informal communications in cases where the plans are formal and properly maintained under ERISA procedures, because ERISA provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), which shall contain "a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." *Id.* § 1102(b)(3).[7] Such claims are precluded by the terms and purpose of the statute. The Severance Plan, however, was created without ERISA's reporting and disclosure formalities and did not contain an amendment procedure. Several courts have recognized that employer communications may support an estoppel claim where they construe ambiguous plan language or are no less formal than other plan documents. *See, e.g., Taylor Insulation*, 39 F.3d at 759-60; *Slice*, 34 F.3d at 634; *Curcio v. John Hancock Mutual Life Ins. Co.*, 33 F.3d 226, 236-37 & n.17 (3d Cir. 1994); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506,

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[7] Notwithstanding these statutory provisions, as noted in *Taylor Insulation*, "[t]here are no particular formalities that a welfare plan must comply with to be an ERISA plan. It need not even be in writing; . . . this is not a prerequisite to coverage." 39 F.3d at 760. *See Curtiss-Wright Corp. v. Schooenjongen*, 115 S. Ct. 1223, 1230-31 (1995); A-11.

1517-18 (5th Cir. 1994); *Greany*, 973 F.2d at 821-22; *Law*, 956 F.2d at 367-68; *National Companies Health Benefit Plan v. St. Joseph's Hosp. of Atlanta*, 929 F.2d 1558, 1571-74 (11th Cir. 1991); *Black v. TIC Investment Corp.*, 900 F.2d 112, 114-16 (7th Cir. 1990); *Kane*, 893 F.2d at 1285 & n.3; *see also, e.g., In re Momentum Mfg. Corp.*, 25 F.3d 1132, 1134, 1137 (2d Cir. 1994) (estoppel claim upheld where bankrupt company's "Disclosure Statement, together with other company communications," led employees to believe company's promise of severance, which it later sought to withdraw). This approach is consistent with this Court's recent pronouncement that ERISA "follows standard trust law principles in dictating only that whatever level of specificity [an employer] ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level." *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1231 (1995). Accordingly, the court below properly ruled that where an ERISA plan contains no amendment procedure, an employer's written communication to a plan participant that is at the same level of formality as other plan documents may support an estoppel claim.[8] The circuits are not split on this issue.

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[8] The Second Circuit also held that the written communication promising Schonholz benefits under the Severance Plan supports her ERISA contract-based claim, an issue LIJ did not raise before this Court. Schonholz thus would have an alternate basis for recovery even if her estoppel claim were rejected.

CONCLUSION

The decision below does not conflict with any decision of this Court and does not present any genuine conflict among the circuits on any issue warranting this Court's review. Rather, the decision represents a proper resolution of the issues presented, consistent with the language and purpose of ERISA. For these reasons, the petition for writ of certiorari should be denied.

Dated: New York, New York
October 25, 1996

Respectfully submitted,

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No. 96-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LONG ISLAND JEWISH MEDICAL CENTER,

Petitioner,

vs.

GLENISS S. SCHONHOLZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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I. The Court Should Grant The Petition To Correct The Second Circuit's Misconstruction Of The *Fort Halifax* Test And To Resolve Confusion Among The Circuits As To The Appropriate Legal Standard.

In her opposition brief, Schonholz fails to reconcile the two divergent approaches to determining when an offer of severance benefits constitutes an ERISA "plan" that have emerged since this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). The first approach adheres to the *Fort Halifax* test and focuses the inquiry on whether an "*ongoing administrative program*" is required. *See, e.g., Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 455 (1st Cir.

1995)(focusing on whether severance offers required complicated administrative apparatus either to calculate or distribute promised benefits); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530 (3d Cir. 1992)(focusing on whether offer required creation of new administrative scheme); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) (same).[1]

The second approach, taken in *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993), and *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989), and pushed to a new extreme by the Second Circuit here, improperly equates the need for any discretionary decision-making with the existence of an "ongoing administrative program."

Schonholz tries to make much of the fact that in some of the cases in which the first approach has been followed (*e.g.*, *Kulinski* and *Fontenot*), the courts have distinguished prior cases in part on the absence of discretionary decision-making. Schonholz misses the point. LIJ does not contend that it is improper for courts to consider the extent to which discretionary decisions must be made as a factor in determining whether an ERISA plan exists. What *is* improper, though, is for courts to equate the need or even the potential for the exercise of discretion with the existence of, let alone the requirement for, an ongoing administrative program, as the Second Circuit did here, and as the courts did in *Pane* and *Bogue*.[2]

Schonholz also argues that this more expansive approach is consistent with this Court's holding in *Fort Halifax*.

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[1] *See also Delaye v. Agripac, Inc.*, 39 F.3d 235 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1402 (1995); *Kulinski v. Medtronics Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994); *James v. Fleet/Norstar Fin.Group, Inc.*, 992 F.2d 463 (2d Cir. 1993); *Fontenot v. NL Indus. Inc.*, 953 F.2d 960 (5th Cir. 1992).

[2] The exercise of discretion, potential or actual, may implicate, for example, the task of computing eligibility or aggregate compensation for a body of employees and still not require an ongoing administrative program (and, hence, not be under ERISA). *James v. Fleet/Norstar Fin. Group, Inc.*, 992 F.2d 463 (2d Cir. 1993).

Schonholz is again mistaken.[3] The *Fort Halifax* test is rooted in the purpose of pre-emption: to "'eliminat[e] the threat of conflicting and inconsistent State and local regulation.'" *Fort Halifax,* 482 U.S. at 9 (quoting 120 Cong.Rec. 29197 (1974)). Thus, the inquiry must focus not on whether *some* administration is required, but rather on whether, in order to maintain a benefits plan, an employer must implement an ongoing administrative apparatus that requires protection from a "patchwork scheme of regulation." *Id.* at 11. Otherwise, any offer of severance *benefits* could be construed as an ERISA *plan*; a proposition that is unsupported by the statute and was flatly rejected by this Court as imposing an unintended burden (one that might persuade employers not to grant benefits). *See Fort Halifax*, 482 U.S. at 11-12. The courts in *Schonholz, Bogue* and *Pane* completely disregarded this reasoning and, as a consequence, developed a conflicting legal standard.

Here, for example, no administrative apparatus was ever established, as Schonholz concedes (Opp. Br. at 8, n. 5). Schonholz argues vociferously that "*Fort Halifax* and its progeny look to the *need* for an administrative program, not to its implementation," implying that at some future unspecified time, LIJ would have been required to develop an administrative apparatus. *Id.* (Emphasis in original, citations omitted.) Yet, Schonholz fails to recognize that by the time the May 3 Memorandum was revoked, it had (according to Schonholz) been in effect for almost two years. Further, (again, according to Schonholz), LIJ had already made one of the two "managerial assessments and decisions inherent in the terms of the Severance Plan" (Opp. Br. at 8) that might have been

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[3] LIJ does not contend, as Schonholz erroneously suggests, that the Second Circuit's decision dramatically alters this Court's precedent because it makes all of ERISA's substantive and procedural requirements applicable to all severance offerings (Opp. Br. at 4). Rather, the Second Circuit's decision dramatically alters the Fort Halifax test by equating the need for discretionary decision-making with the existence of an ongoing administrative program. By doing so, the Second Circuit's decision will make ERISA applicable to severance offerings that are not properly ERISA *plans* and force employers to comply with all *relevant* requirements.

required; namely, determining whether Schonholz was being terminated for cause. Still, as Schonholz concedes, no administrative apparatus had been established. The second of these "managerial assessments" -- a determination as to whether Schonholz, after a year, should have been entitled to an additional six months of benefits -- might never have been required. Even if the issue had arisen, making such a momentary determination would not have required an administrative program in any sense of the term, never mind a program that required protection from a patchwork scheme of regulation. *See Fort Halifax,* 482 U.S. at 13-15. *Cf. James*, 992 F.2d at 466.

In finding that the need for such limited discretionary decision-making transformed the May 3 Memorandum into an ERISA plan, the Second Circuit misconstrued this Court's test. [4] This is the same approach followed by the courts in *Bogue* and *Pane*.[5] The confusion this approach has sown is exacerbated by the fact that conflicts exist within the same Circuits, making it impossible for an employer to gauge which approach will be applied. *Compare James, 992* F.2d at

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[4] While Schonholz contends that managerial discretion was only one factor examined by the Court, the second proffered factor -- "whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria" (Opp. Br. at 7, n. 4; A-7) -- ultimately focuses on the same issues involved in the managerial discretion analysis. As to the third stated factor -- whether a "reasonable employee would perceive an ongoing commitment by the employer to provide employee benefits" -- it is unclear how this factor is probative of whether the offer of severance benefits implicates an administrative apparatus. A single employment contract with the promise of severance pay in the event of termination could justify such a perception, yet would not give rise to an ERISA *plan.*

[5] Schonholz also attempts to make much of the fact that the courts in *Schonholz, Pane* and *Bogue* properly identified the *Fort Halifax* test by name, and criticizes LIJ for "merely ... focusing on the *results*" of these cases (Opp. Br. at 7, n. 4). It seems that Schonholz has it backwards: a court's mere incantation of a test does not mean the court has it right; it is the "result," as reflected in the court's analysis and holding, that is probative of whether the court is applying the proper legal standard.

466, with *Schonholz; Belanger*, 71 F.3d at 455-56, with *Simas v. Quaker Fabric Corp.*, 6 F.3d at 849 (1st Cir. 1993); *Angst*, 969 F.2d at 1539-41, with *Pane*, 868 F.2d at 635; and *Delaye* 39 F.3d at 237-38, with *Bogue*, 976 F.2d at 1323. Such intra-circuit conflicts, and the attendant uncertainties, are precisely what ERISA pre-emption was intended to avoid.

Accordingly, review of this case is necessary to correct the Second Circuit's misconstruction of the *Fort Halifax* test and to provide clarification to the Circuits.

II. Plaintiff's Promissory Estoppel Claim Is The Precise Claim That Has Split The Circuits

In its Petition, LIJ demonstrated that the Fifth, Ninth, Tenth and Eleventh Circuits have held that courts may not fashion a federal common law cause of action for promissory estoppel under ERISA, while the Second, Third and Seventh Circuits have recognized such a claim. Schonholz does not directly dispute this, because she cannot. Instead, she focuses this Court on irrelevant issues.[6]

Schonholz's opposition is based on her contention that there are two instances in which the use of estoppel principles under ERISA is appropriate. The first, according to Schonholz, is when a plaintiff seeks to use equitable estoppel with regard to statements allegedly made by an employer that purport to interpret an ambiguous provision of an ERISA plan.

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[6] Schonholz's strategy is bold and relies on misdirection. Schonholz admits that the courts in *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1381 (1995); *Miller v. Coastal Corp.*, 978 F.2d 622 (10th Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989), properly refused to recognize a claim for promissory estoppel (Opp. Br. at 5, 10). She then seeks to avoid the implication of that admission by suggesting that her case is factually distinguishable from those cases. As shown below, it is not. Her claim is the precise type of claim at issue in all of the cases cited by LIJ in its Petition.

Whether the use of equitable estoppel is appropriate in such a case is irrelevant. As Schonholz herself acknowledges, that was not the circumstance presented in the cases cited by LIJ, nor is it the circumstance presented here. Rather, in the instant case as well as in all of the cases cited by LIJ, a plaintiff, who, but for an alleged promise, would be ineligible for benefits, seeks to use promissory estoppel to create a claim under ERISA.

In *Devoll v. Burdick Painting, Inc.*, 35 F.3d 408 (9th Cir. 1994); *cert. denied*, 115 S. Ct. 1381 (1995), for example, the plaintiff alleged that his employer had promised to maintain his enrollment in a plan that provided a certain level of benefits. The employer allegedly breached this promise by enrolling the plaintiff in a plan that provided an inferior level of benefits. There was no ambiguity in the plan. Plaintiff sued to enforce the employer's alleged promise.

Similarly, in *Miller v. Taylor Insulation Co.*, 39 F.3d 755 (7th Cir. 1994), the employer allegedly breached its promise to maintain plaintiff's enrollment in a particular medical reimbursement plan. Again, the case did not involve an alleged representation regarding an ambiguous provision of a plan but rather an action to enforce the employer's alleged promise.

Here, as in *Devoll* and *Miller*, Schonholz is not seeking to use equitable estoppel with regard to a proffered interpretation of an ambiguous provision of a plan. Indeed, Schonholz neither alleges the existence of an ambiguity nor contends that the clear terms of the May 3 Memorandum limited LIJ's right to revoke the severance benefits. Rather, as in *Devoll* and *Miller*, Schonholz seeks to use promissory estoppel to enforce an alleged promise on the part of LIJ to extend her severance benefits. This is made clear by Second Circuit's analysis (*e.g.*: "[a]ssuming that the jury concludes that LIJ promised to extend Schonholz's benefits, that LIJ should have known that Schonholz would rely, that Schonholz did in fact rely, and that Schonholz was injured by that reliance, it is clear to us that she will be able at least to contend that an injustice would result if the promise is not enforced"). A-14.

The Second, Third and Seventh Circuits recognize such a claim. The Fifth, Ninth, Tenth and Eleventh do not.

The second instance that Schonholz contends permits the use of estoppel principles is "when an employer makes a written promise that is at the same level of formality as a plan creation document which lacks an amendment procedure and an employee reasonably and detrimentally relies on that promise." Opp. Br. at 10. Schonholz even goes so far as to characterize this as the holding of the Second Circuit. *Id.*

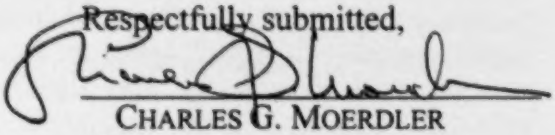
Schonholz's argument is disingenuous. The Second Circuit found that Schonholz stated two distinct claims under ERISA: (1) a contractual vesting claim, and (2) a promissory estoppel claim. To be cognizable, the contractual vesting claim requires a finding that the alleged "vesting" document is of the same level of formality as the alleged "plan creation document." The promissory estoppel claim, on the other hand, has nothing to do with the relative levels of formality of the May 3 Memorandum and the December 18 letter. Again, this is evident from the Second Circuit's decision. The court analyzed the claim based on the four traditional elements of promissory estoppel: a promise, reliance, injury and injustice (A-12). There is nothing in the court's opinion to suggest that its recognition of a promissory estoppel claim was contingent on a finding that the December 18 letter was of the same level of formality as the May 3 Memorandum.

Schonholz cannot escape the fact that her claim for promissory estoppel is the precise claim which has split the Circuits. Schonholz, herself, has admitted that it is inappropriate for federal courts to fashion this type of relief, and does not dispute the importance of having a uniform body of law under ERISA. Accordingly, the Petition should be granted to permit review of this important issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,



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